(26,633)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 547.

CORNELIA A. DUNBAR, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals, State of New York.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

CASE ON APPEAL.

Aron & Wise, Esqs., Attorneys for Plaintiff-Appellant, No. 50 Pine Street, New York City.

Lamar Hardy, Esq., Attorney for Defendant-Respondent, Municipal Building, New York City.

1 Supreme Court of the State of New York, Appellate Division, First Department.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

Statement Under Rule 41.

This action was commenced by the service of the summons and complaint upon the defendant on October 28, 1915.

Issue was joined by the service of defendant's answer on December 3, 1915.

Plaintiff appeared by Messrs. Bridges, Bacon, Aron & Vanderveer, her attorneys, and the defendant appeared by Lamar Hardy, Esq., its attorney. There has been no change of parties except that Messrs. Aron & Wise have been substituted as attorneys for plaintiff-appellant in place and stead of Bridges, Bacon, Aron & Vanderveer.

The action came on to be tried on February 2, 1916, before
2 Mr. Justice Hotchkiss sitting without a Jury.

A decision containing Findings of Fact and Conclusions of Law was thereafter, and on March 30, 1916, signed by the said Justice and entered in the office of the Clerk of New York County on that day.

Thereafter and on April 11, 1916, judgment was entered in favor of the defendant dismissing the complaint.

Thereafter and on April 20, 1916, exceptions to decision of Mr. Justice Hotchkiss were duly filed in the office of the Clerk of New York County and served upon the attorney for the defendant.

On April 27, 1916, Notice of Appeal was duly served and filed.

Notice of Appeal.

Supreme Court, New York County.

CORNELIA A. DUNBAR, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

SIRS: Please take notice, that the above named plaintiff hereby appeals to the Appellate Division of the Supreme Court for
3 the First Department from the judgment entered and filed herein in the office of the Clerk of the County of New York on the 11th day of April, 1916, and that said plaintiff appeals from each and every part of said judgment as well as from the whole thereof.

Dated, New York City, N. Y., April 26, 1916.

Yours, &c.,

BRIDGES, BACON, ARON & VANDERVEER,
Attorneys for Plaintiff.

No. 50 Pine Street, Manhattan Borough, New York City.

To William F. Schneider, Esq., Clerk of the County of New York; Lamar Hardy, Esq., Attorney for Defendant, Municipal Building, Manhattan Borough, New York City.

4 *Summons.*

Supreme Court, New York County.

CORNELIA A. DUNBAR, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Summons.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within 20 days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, October 28th, 1915.

BRIDGES, BACON, ARON & VANDERVEER,
Plaintiff's Attorneys.

Post Office Address and Office, No. 50 Pine Street, Borough of Manhattan, City of New York.

5 *Complaint.*

Supreme Court, New York County.

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

The plaintiff, by her attorneys, Bridges, Bacon, Aron & Vanderveer, complaining of the defendant, alleges:

First. The plaintiff is and at all times hereinafter mentioned was the owner in fee simple of certain property located at Nos. 34-36 North Moore Street, in the Borough of Manhattan, City, County and State of New York, and more particularly described as follows:

All that certain lot, piece or parcel of land situate, lying and being in the Fifth Ward of the City of New York on the southerly side of North Moore Street at present known and distinguished as lot number thirty-six (36) North Moore Street, bounded Northerly in front by North Moore Street, then Southerly in the rear by land formerly of Walter Bowne, Easterly by land formerly of Peter Dob, deceased, and Westerly by land now or formerly of John Baker containing in breadth in front and rear twenty-five feet and in length on each side eighty-seven feet six inches be the same more or less, the said

6 lot of land above described being also known and distinguished on a map or chart thereof and of the other lots adjoining made by Benjamin Taylor, City Surveyor, May, 1796, by the number Two hundred and sixty-five (265) being the same premises conveyed to James Forsyth by Joseph Forsyth and May, his wife, by deed dated April 30, 1859, and recorded in the office of the Register of the City and County of New York in Liber 785 of Conveyances, page 494 on the 5th day of July, 1859.

And also:

All that dwelling house and lot of ground situate, lying and being in the fifth (late sixth) Ward of the City of New York on the Southerly side of North Moore Street being part of land purchased by Effingham Embree of John Irelands and is known and distinguished by lot number Two hundred and sixty-four, Bounded northerly in front by said North Moore Street, Westerly by lot number Two Hundred and sixty-five, Southerly in the rear by lot number Two Hundred and forty-seven and Easterly by lot number Two Hundred and sixty-three, containing in breadth in front and rear twenty-five feet and in length on each side eighty-seven feet six inches, be the same more or less, and being the same premises as were conveyed by Edward Orser of the City of New York, Cartman, and Elizabeth, his wife, unto Peter Dob, late of said city, deceased, by deed bearing date the seventh day of June, 1810, and recorded in the office of the Clerk of the City and County of New York in Liber No. 87 of Conveyances at page 518 the 13th day of June, 1810, and by James W.

Robinson and Hannah, his wife, Charlotte Dusenberry
7 (widow) and James Conger and Eliza, his wife, to John Telford by deed dated September 20th, 1884, and recorded in the office of the Register of the City and County of New York in Liber 452 of Conveyances, page 640, on the 7th day of January, 1845, said premises being known by the street number 34 North Moore Street.

Second. That the plaintiff acquired the title to the said property as purchaser thereof and is and for more than one year next preceding the commencement of this action, the property has been in the sole possession of the plaintiff herein.

Third. That on the first day of October, 1907, plaintiff entered into a certain indenture of lease with William Hills and William Hills, Jr., co-partners doing business under the firm name and style of William Hills, Jr., a copy of which said lease is hereto annexed and made a part of this complaint and to which for greater certainty plaintiff begs leave to refer.

Fourth. That on the 20th day of June, 1914, the said William Hills and William Hills, Jr., individually and copartners were duly adjudicated bankrupts in the United States District Court for the Eastern District of New York and have since been duly discharged as bankrupts.

Fifth. Upon information and belief, during the terms of said lease and prior to the bankruptcy the aforesaid tenants had used and consumed water furnished and sold by the defendant City of New York herein to the said tenants.

8 Sixth. Upon information and belief that at the time of the said bankruptcy the defendant herein, City of New York, claimed that there was due and owing for the water so sold and used the sum of Three hundred and fifty-five and 15/100 dollars ($355.15) being the price of water fixed by the amount consumed by said tenants as shown by the meters installed by said defendant.

Seventh. That all the water so used during the term of the lease was used by the tenants herein and no part of it by the plaintiff and that said water was furnished to the said tenants without the knowledge, consent or approval of the plaintiff herein. Upon information and belief that the tenant has not paid for the said water.

Eighth. That it appears from the public records in the office of the Collector of Taxes of the Borough of Manhattan that the defendant herein claims a lien on the property of the plaintiff in the sum of Three hundred and seventy-nine and 89/100 dollars ($379.89) for the aforesaid unpaid water charges as shown by the records of the office of the Collector of Assessments and Arrears for the year 1913 in the amount of One hundred and twenty-seven and 42/100 dollars ($127.42); by the records of the Receiver of Taxes for the year 1914 for One hundred and seventy-one and 25/100 dollars ($171.25) and of the Department of Water Supply, Gas & Electricity for the year 1915 in the amount of Eighty-one and 22/100 dollars ($81.22). That the said alleged lien is void and of no effect; that the validity thereof would not necessarily appear upon

the face of said records, and on proceedings to enforce the same; that the said alleged lien is in violation of the rights of the defendant, under the 14th Amendment of Section I of the Constitution of the United States of America, and deprives the landlord of her property without due process of law. That the plaintiff has no complete or adequate remedy at law to remove said apparent lien upon her title and claim against her property.

Ninth. That notice of claim as required by Section 261 of the Charter of the City of New York was duly served upon the Comptroller of said city more than thirty days prior to the commencement of this action and the said Comptroller has failed and refused to satisfy or otherwise adjust the said claim.

Wherefore plaintiff prays judgment that the said alleged lien for the water charges and all assignments, instruments, entries and records in respect of the premises aforesaid so far as the plaintiff is concerned be adjudged to be void and be cancelled of record and that the proper department and officers of the City of New York be required to make the proper entries accordingly; that the defendant City of New York be adjudged to have no title, lien, claim, demand or interest in or in respect of said premises by virtue of said alleged water charges; or any lien thereon, or any assignment or transfer thereof; that the defendant, City of New York, may be during the pendency of this action and forever enjoined and restrained from asserting and claiming any right, title, lien or possession of said premises or any part thereof by virtue or reason of said alleged water charges, or any lien thereon and that the plaintiff have such other further judgment, order or decree as in the premises may be just, besides the costs of this action.

BRIDGES, BACON, ARON & VANDERVEER,
Attorneys for Plaintiff.

50 Pine Street, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Harold G. Aron, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the foregoing complaint; that the foregoing complaint is true of his knowledge, except as to those matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Deponent further says that said action is brought to have cancelled of record a tax lien; that the matters of record have been personally examined by deponent and that the lease referred to in the complaint is in the possession of deponent; that the said lease and the matters of public record are the grounds of deponent's belief as to all matters not stated upon knowledge.

That the reason why this verification is not made by the plaintiff is that the plaintiff is not a resident of the county where deponent or any member of deponent's firm resides or has his place of business,

the said plaintiff being a resident of and now sojourning in
11 the City of Morristown, State of New Jersey.

HAROLD G. ARON.

Sworn to before me this 28th day of October, 1915.

HARRY J. AHLHEIM,
Commissioner of Deeds,
New York City.

Copy.

This indenture made the first day of October, in the year one thousand nine hundred and seven Witnesseth that Cornelia A. Dunbar, as Lessor grants, demises and lets to William Hills and William Hills, Jr., doing business under the name of William Hills, Jr., of the Borough of Manhattan in the City of New York, and to their legal representatives as Lessees, all the building known as Numbers Thirty-four (34) and Thirty-six (36) North Moore Street, in the said Borough of Manhattan and City of New York, for the term of Seven (7) years and Six (6) months commencing the first day of November, nineteen hundred and seven and ending the first day of May, nineteen hundred and fifteen.

The said lessees for themselves and their legal representatives do covenant with the said lessor and her legal representatives as follows:

First. To pay the annual rent of Six thousand ($6,000)
12 Dollars in equal monthly payments in advance on the first day of each and every month during said term.

Second. To pay whenever called upon all charges for Croton Water which are or may be assessed or imposed on said building, according to law, during the term of this lease, and if not so paid, the same shall be added to the rent then due or to become due.

Third. Not to cut, drill into, nor otherwise disfigure, nor allow the disfigurement of the iron, marble or stone of the building, nor obstruct nor permit any obstruction of any lights or skylights nor injure nor deface the premises nor without the written consent of the Lessor make any alterations therein; nor use or suffer to be used the whole or any part thereof for any purpose more injurious thereto than the general Commission Business.

Fourth. To make without expense to the lessor, repairs (not made necessary by fire) requisite to preserve the premises in good condition such repairs to be equal to the original in class and quality, also to promptly comply with all orders of the Board of Fire Underwriters, Municipal and State Authorities, affecting the demised premises. If any leakage of the roof shall occur, the Lessee shall notify in writing the Lessor and said Lessor shall not be liable for any damage caused by such leakage except upon failure to repair the roof within a reasonable time after such written notice is delivered to the Lessor.

Fifth. To permit the Lessor and agent at all times to enter any part of the premises for the purpose of inspection and repair;
13 and to show them to persons wishing to hire or purchase; and during three months next preceding the expiration of the

term, to allow the usual notice "to let" or "for sale" to remain posted upon the premises.

Sixth. Not to use the premises or any part thereof, nor allow their use, for any business which will increase the rate of insurance on said building, and upon any determination of this demise to peaceably surrender the premises in as good condition as at the commencement of the term, reasonable wear and damage by fire excepted.

It is understood and agreed between the parties to these presents, that the Lessor or legal representatives shall not be responsible for any latent defect or change of condition in the premises, nor for damage to the same or to goods or other things contained therein, by any overflow or leakage upon or into the premises from the Croton Water or any other source.

It is further understood and agreed between the parties to these presents that the within demised premises are leased by the Lessor only on condition that the Lessee shall not assign, let or underlet the within demised premises or any part thereof, during the term of this lease without written consent of the Lessor, or legal representatives, it being understood by and between the parties hereto that any attempt to assign, let or underlet said premises without such written consent shall at the option of the Lessor, operate as a cancellation of this lease and shall entitle said Lessor to re-enter and take possession of the within demised premises.

The said Lessor or agents shall have at all times the right
14 to prescribe the form, style, size and location of any and all signs and inscriptions to be placed on any portion of the herein mentioned building and the right to remove any objectionable signs or inscriptions without being liable to prosecution therefor.

The Lessees shall operate and maintain the engine, boiler and elevators in the demised premises at their own cost and expense and the Lessor shall not be answerable for any failure, defect or insufficiency in the construction or working of the apparatus or appurtenances, nor be held to any liability in relation thereto.

The Lessees shall have the privilege of placing an awning in front of the said building, provided they secure the necessary privilege from the proper Municipal Authorities.

The Lessees shall also have the privilege of altering the front of the said building, but in consideration of such consent being given, the Lessees agree that should the Lessor desire that the front be restored to its original condition at the expiration of this demise or any other such extension thereof, that they will, at their own cost and expense cause such change to be made.

On consideration and upon condition that the aforesaid rents, covenants and agreements be all and severally paid and performed, without evasion or delay the Lessor for herself and her legal representatives, covenants that the Lessees and their legal representatives may at all times during said term peaceably have and enjoy the demised premises.

Conditioned, that in case of non-payment of the said rent at the times and in the manner above provided, or if default shall

15 be made in any of the covenants or agreements herein contained, the said Lessor and her legal representatives shall have the right to enter the said premises, either by force or otherwise, without being liable to any prosecution therefor and to re-let the same as the agent of the said Lessees and to receive the rent therefor, applying the same to the payment of the rent due by these presents and holding the said Lessees and their legal representatives liable for any deficiency.

In case the premises hereby demised shall be partially damaged by fire, but not rendered untenantable, the same shall be repaid with all proper speed, at the expense of said Lessor or her legal representatives, but if the damage shall be so extensive as to render the premises untenantable the rent shall be proportionately paid up to the time of such damage and shall from thenceforth cease until such time as the same shall be put in good repair; but in case of such destruction of the building by fire or otherwise as to render it necessary to rebuild the same, and upon the payment of the proportional rent up to the time of such destruction, then and from thenceforth this lease shall cease and come to an end.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

16 *Answer.*

Supreme Court, New York County.

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

The defendant, by its attorney, Lamar Hardy, Corporation Counsel, answering the plaintiff's complaint herein, respectfully shows to this Court and alleges as follows:

First. The defendant denies that it has any knowledge or information sufficient to form a belief as — the allegations contained in the paragraphs marked "First," "Second," "Third," and "Fourth" of the plaintiff's complaint herein.

Second. Upon information and belief the defendant denies each and every allegation contained in the paragraph marked "Fifth" of the plaintiff's complaint herein.

Third. The defendant denies each and every allegation contained in paragraph marked "Sixth" of the plaintiff's complaint herein and with respect thereto alleges that on the said 20th day of June, 1914, there was money due and owing to it for water furnished to and consumed upon the premises mentioned herein.

17 Fourth. Upon information and belief the defendant denies each and every allegation contained in paragraph marked "Seventh" of the plaintiff's complaint herein.

Fifth. Defendant denies each and every allegation contained in the paragraph marked "Eighth" of the plaintiff's complaint herein except that it admits that it claims a lien on the property of the plaintiff herein in the sum of $379.89, being unpaid water charges for water consumed between December 4, 1912, and June 14, 1915, on the said premises.

As and for a distinct and separate defense the defendant alleges:

Sixth. That prior to and during the period from December 4, 1912, to June 14, 1915, there were two meters on the premises described in the plaintiff's complaint herein for measuring the supply of water to the said premises; that said meters were installed by order of the Commissioner of Water Supply under the authority of the provisions of the Greater New York Charter and that the registration of said meters during said period showed the full amount of water supplied to said premises and consumed therein; that a payment of $5.90 for water consumed between October 21, 1914, and February 2, 1915, was made but that no other payments were made for water consumed during said period and that there is still due and owing to the defendant for water so supplied to the said premises the sum of $379.89, which sum, under the provisions of the Greater New York Charter, is a valid lien upon the premises.

18 Wherefore, the defendant demands judgment against the plaintiff dismissing the complaint herein, with costs.

LAMAR HARDY,
Corporation Counsel, Attorney for Defendant.

Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.

Verification.

New York Supreme Court, County of New York.

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Louis H. Hahlo, being duly sworn, says that he has been duly designated as Acting Corporation Counsel of The City of New York, and as such that he is an officer of the defendant in the above-entitled action; that the foregoing answer is true to his knowledge ex-

19 cept as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that it is a corporation; that the

grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the city government and from statements made to him by certain officers or agents of the defendant.

LOUIS H. HAHLO.

Sworn to before me, this 3rd day of December, 1915.

MATTHEW F. DUFFY,
Notary Public No. 105, *Kings Co.*

Certificate filed in New York Co., No. 31.
Certificate filed in Bronx Co., No. 4.

20 *Judgment.*

At a Special Term of the Supreme Court of the State of New York, Part III thereof, Held in and for the County of New York, at the County Court-house, in the City of New York, Borough of Manhattan, on the 30th Day of March, 1916.

Present: Hon. Henry D. Hotchkiss, Justice.

CORNELIA A. DUNBAR, Plaintiff.

against

THE CITY OF NEW YORK, Defendant.

The above entitled action having been duly tried before me at a Special Term of the Supreme Court, Part III thereof, held in and for the County of New York, on the 2nd day of February, 1916, after issue joined and testimony having been offered by the plaintiff and the defendant, upon the issues raised by the pleadings herein, and after due deliberation the Court having rendered its decision which was duly filed herein, wherein and whereby the Court among other things found that the complaint herein should be dismissed upon the merits with costs to the defendant, and the costs having been duly taxed in the sum of $—.

Now, on motion of Lamar Hardy, Corporation Counsel, attorney for the defendant, it is

21 Adjudged that the complaint herein be and the same hereby is dismissed upon the merits; and it is further

Adjudged that the defendant, The City of New York, recover of the plaintiff, Cornelia A. Dunbar, the sum of $66.85/100, the amount of said defendant's costs as taxed, and that said defendant have execution therefor.

Enter.

H. D. H., *J. S. C.*

Dated, New York, April 11, 1916.

WM. F. SCHNEIDER, *Clerk.*

Decision.

Supreme Court, New York County.

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

This action having come on to be tried before me at a Special Term of the Supreme Court, Part III thereof, held in and for the
22 County of New York at the County Court House in the City of New York, Borough of Manhattan, on the second day of February, 1916, after issue joined, and the parties attending hereto by their respective attorneys, Bridges, Bacon, Aron & Vanderveer, Esqs., appearing as attorneys for the plaintiff, and the Corporation Counsel of the City of New York appearing as attorney for the defendant, by David Robson, Esq., of counsel, and having taken the evidence of the respective parties in this action, I do hereby decide and find as follows:

Findings of Fact.

I. The plaintiff is and at all times hereinafter mentioned was the owner in fee simple of certain property located at No. 34-36 North Moore Street in the Borough of Manhattan, City, County and State of New York, as more particularly described in the complaint.

II. That on the first day of October, 1907, plaintiff entered into a certain indenture of lease with William Hills and William Hills, Jr., co-partners doing business under the firm name and style of William Hills, Jr., a copy of which said lease is thereto annexed and made a part of the complaint and to which for greater certainty plaintiff begs leave to refer.

III. That on the 20th day of June, 1914, the said William Hills and William Hills, Jr., individually and as copartners were duly adjudicated bankrupts in the United States District Court for the Eastern District of New York and have since been duly dis-
23 charged as bankrupts. That in said proceedings the plaintiff moved before the United States District Court for an order directing the trustee to pay the water charges then a lien on said premises as a tax entitled to priority; the motion was denied and the denial affirmed by the United States Circuit Court of Appeals on the ground that said water charges were not a tax.

IV. During the terms of said lease and prior to the bankruptcy the aforesaid tenants had used and consumed water furnished and sold by the defendant City of New York herein to the said tenants.

V. That at the time of the said bankruptcy the defendant herein, City of New York, claimed that there was due and owing for the water so sold and used the sum of Three hundred seventy-nine and

89/100 ($379.89) Dollars, being the price of water fixed by the amount consumed by said tenants as shown by the meters installed by said defendant. That the City did not prove any claim in bankruptcy against the tenants.

VI. That all the water so used during the term of the lease, was used by the tenants herein or their sublessees and no part of it by the plaintiff; that the tenant occupied the entire building and the lessor did not occupy any part of the building whatever and did not use any of the water; and that said water was furnished to said tenants through two water meters.

VII. The first meter was installed in the year 1900 to replace a meter removed, and there is no evidence to show whether this
24 meter was installed at the request of the owner or at the request of a tenant or at the direction of the duly constituted authorities of The City of New York. The permit, therefore, was issued to one John Ford, and no evidence was given as to his relation to the property or as to the installation of the meter removed.

VIII. A second meter was installed during the year 1907 at the request of the tenants upon a written application signed by them "as owners" without the knowledge of the plaintiff, because the tenant required more water than could be supplied through the meter then on the premises.

IX. That from the date of the installation of the first meter in 1900, and at all times thereafter, the defendant furnished water which was consumed upon the premises and measured by two meters.

X. That during the period from December 4, 1912, to June 14, 1915, registration of said two meters showed the full amount of water furnished to and consumed upon the said premises to be as follows:

25 Two Meters.

No. 576,894.		No. 159,836.	
Mar. 4, 1913, to June 3, 1913:		Dec. 4, 1912, to Mar. 4, 1913:	
	$52.40		$58.40
	7.86		8.76
	$60.26		$67.16

Total, $127.42.

Sent to Collector of Assessments and Arrears.

June 3, 1913, to Sept. 2, 1913:		Sept. 2, 1913, to Dec. 1, 1913:	
	$48.40		$22.90
	7.26		3.44
	$55.66		$26.34

Sept. 2, 1913, to Dec. 1, 1913:

$65.50
9.83

$75.33

Dec. 1, 1913, to Mar. 3, 1914:

$12.10
1.82

$13.92

Total, $130.90 plus Total, $40.26.
Total, $171.25.

Returned to Comptroller in 1915.

Dec. 1, 1913, to June 30, 1914:

$54.40
8.16

$62.56

Mar. 3, 1914, to June 1, 1914:

$3.90
.59

$4.49

June 30, 1914 to Aug. 29, 1914:

$2.00
.30

$2.30

June 1, 1914, to Aug. 29, 1914:

$ .80
.12

$ .92

Aug. 29, 1914, to June 14, 1915:

$3.50

Aug. 29, 1914, to Oct. 21, 1914:

$5.00
.75

$5.75

Oct. 21, 1914, to Feb. 2, 1915:
Paid.
$5.90

Feb. 2, 1915, to June 14, 1915:
$1.70

Total, $68.36 plus Total, $12.86.
Total, $81.22. From the records of the Water Department.

XI. That no payment was made for water so furnished and consumed and measured by the said two meters during the said period between December 4, 1912, and June 14, 1915, except the amount of $5.90 for water consumed between October 21, 1914, and September 2, 1915, and that there is still due and owing to the defendant for water so furnished and consumed upon the said premises the sum of $379.89.

26 XII. That the said sum of $379.89 is the aggregate amount of charges fixed and determined in accordance with the rates

established by an ordinance adopted by the Board of Aldermen of the City of New York and in accordance with the provisions of the Greater New York Charter.

And from the foregoing I make the following

Conclusions of Law.

I. That the said meters and each of them were maintained upon the premises under the authority given to the Commissioner of Water Supply, Gas and Electricity by the provisions of the Greater New York Charter.

II. That the said sum of $378.89 is a valid charge and lien upon the premises in accordance with the provisions of the Greater New York Charter and has priority over all other charges and liens against the said premises.

III. That the imposition of the said charge and lien against the said premises is not in violation of Section 1 of the 14th Amendment of the Constitution of the United States of America and does not deprive the plaintiff of her property without due process of law.

IV. That the defendant is entitled to judgment upon the merits dismissing the plaintiff's complaint herein with costs.

Dated, New York, March 30th, 1916.

H. D. HOTCHKISS,
Justice of the Supreme Court.

Supreme Court, New York County.

27 *Exceptions to Decision.*

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

The plaintiff above named hereby excepts to the decision of Mr. Justice H. D. Hotchkiss herein dated March 30, 1916, and filed in the office of the Clerk of the County of New York, March 30, 1916, in the following particulars:

1. To the Twelfth Finding of Fact on the ground that there is no evidence to support it, and upon the further ground that the same is contrary to law and that the said sum of $379.89 was not the amount of charges fixed and determined in accordance with the rates established by an Ordinance adopted by the Board of Aldermen of the City of New York, and is not in accordance with the provisions of the Greater New York Charter.

28 2. To the Conclusions of Law numbered "II," "III" and "IV."

Dated, New York, N. Y., April 20, 1916.

Yours, etc.,

BRIDGES, BACON, ARON & VANDERVEER,
Attorneys for Plaintiff.

No. 50 Pine Street, New York City.

To William F. Schneider, Esq., Clerk of New York County; Lamar Hardy, Esq., Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

Opinion of Mr. Justice Hotchkiss.

In Provident Institution, etc., vs. Mayer, etc. (113 U. S., 506), the Supreme Court in holding it to be no violation of the constitutional rights of a mortgagor for water rates to be made by legislative authority a lien prior to all other incumbrances adopted or approved New *Yorsey* decisions holding such liens to be valid against the owner for water actually used, which decisions went upon the ground "of an implied contract" (page 514). In his opinion in
29 Hill vs. Thompson (50 N. Y. Sup. Ct. Rep., 165, 173, 174), Sedgwick, Ch. J., said: "The plaintiff is not obliged to have any pipes to furnish water in her premises. Whether or not she shall take it rests in her will. * * * If she chose to take the benefit to any extent, under the statute the benefit must be taken in the form and with the limitations prescribed by the statute. As the consequences are such as she voluntarily assumes, if she allow the water to be furnished at all, there is no ground for arguing that the statute that gives the defendant certain powers or gives a lien for the expenses of the meter is unconstitutional." It was upon this theory that the Supreme Court of Minnesota in City of East Grand Forks vs. Luck (97 Minn., 373), held that the laws of that State which made the owner of premises personally liable for water and light furnished by a municipality to a tenant were not unconstitutional. The question in the case at bar is whether the lien imposed upon the land for metered water used by the plaintiff's tenant without her express consent is valid. On the theory of implied consent I think the answer must be in the affirmative. Judgment for the defendant, with costs.

30 *Case and Exceptions.*

Supreme Court, New York County, Special Term, Part III.

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

Before Hotchkiss, J.

New York, February 2nd, 1916.

Appearances:

Messrs. Bridges, Bacon, Aron & Vanderveer, attorneys for the plaintiff. Harold G. Aron, Esq., of counsel.

David Robson, Esq., Assistant Corporation Counsel, for the City of New York.

Mr. Aron: I offer in evidence the lease between the plaintiff and the defendants, William Hills, Jr.

Mr. Robson: The City will concede that the plaintiff is the owner of premises 34 and 36 North Moore Street, New York City, and was such owner during the year 1907, to the present time.

31 Mr. Aron: And legally in possession of the property, whatever that means?

Mr. Robson: Yes. We will concede that there was a lease made on the first of October, 1907, between the plaintiff and William Hills and William Hills, Jr., copartners, which was for a period of seven years and six months, beginning on November first, 1907, and we will consent to the admission of the lease in evidence.

Mr. Aron: It is annexed to the complaint. If you will stipulate that a correct copy of the lease is annexed to the complaint, that will cover that.

Mr. Robson: I want to put on the record, however, that the lease, as executed, contains this provision: "The said lessees, for themselves and their legal representatives, do covenant with the said lessor and her legal representatives as follows: To pay, whenever called upon, all charges for Croton water which are or may be assessed or imposed on said building according to law during the term of this lease, and if not so paid, the same shall be added to the rent then due or to become due." We will concede that the tenants were adjudicated bankrupts on the 20th day of June, 1914, and were discharged on June 7th, 1915. We can stipulate that the water was supplied on the premises by two meters; that the numbers of those meters were 576,894 and 159,836; that these meters were installed, the first in 1900 and the second in 1907. It is also conceded that the water consumed in the premises was measured by these two meters, and that the charge at the present time outstanding,

for which the City claims a lien, amounts to $379.89, and is for the period between December 4th, 1912, and June 14th, 1915; and we offer this statement to be placed upon the record of the items of these charges.

32 Statement received and marked Defendant's Exhibit A.

Mr. Robson: It is stipulated that no part of this has been paid.

Mr. Aron: Will you stipulate that the lessor moved for a direction of the trustee in bankruptcy to pay it as a tax, and that the motion was denied?

Mr. Robson: If it is relevant, I don't object to it.

Mr. Aron: That the lessor moved in the bankruptcy proceedings to have these water charges paid as taxes, and the motion was denied?

The Court: I don't see its relevancy, but you can put it in if you want to. The constitutionality of these ordinances does not depend in any degree on what some tenant may have or may not have done.

Mr. Robson: I object to it as irrelevant.

Objection overruled; exception.

Mr. Robson: It may appear upon the record that the trustee moved for the payment as taxes, and that the motion was denied, and that the report of the referee was confirmed by Judge Mayer.

Mr. Aron: That was a separate motion. The decision was affirmed by the United States Court of Appeals. Will you stipulate that in the bankruptcy proceedings of the tenant, the City made no proof of claim?

Mr. Robson: It is stipulated that the application for the first meter, which was made on December 3rd, 1900, was made by the owner, and that the second application was made by William Hills, Jr.

Mr. Aron: I can't stipulate whether the owner made the first application or not. I don't know. I think the meter was
33 put in there at the time she bought the property, and I can't stipulate as to that.

Mr. Robson: That the first permit was issued to one John Ford, and that the meter was installed in 1900; that the second meter was installed on the application of William Hills, Jr.

Mr. Aron: On an application signed: "Owner William Hills, Jr."?

Mr. Robson: Yes, and the permit was issued and the meter installed in 1907.

WILLIAM HILLS, JR., called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Aron:

Q. You were a member of the firm of William Hills, Jr., were you not?

A. Yes.

Q. And you occupied the premises 34 and 36 North Moore Street from October, 1907, to January 1st, 1915, did you not?
A. Until June, 1915. I should say—no, until June, 1914.
Q. When did you surrender the premises to the lessor?
A. I think it was January 1st, 1915.
Q. During that time did the lessor occupy any part of the building whatever?
A. None whatever.
Q. Did anyone other than yourselves as tenants use any water in that building?
A. Yes.
Q. Who?
A. I sub-let part of the building.
Q. The lessor used none of the water during the period of your lease?
A. None whatever.

The Court: Is that lease in evidence?
Mr. Robson: It is part of the complaint.
34 Mr. Aron: The lease is a part of the complaint.

Q. Do you recall the installation of a meter there at the time you went into possession—a water meter?
A. There was one—we had one put in in 1907.
Q. Who paid for the installation of that meter?
A. I did.
Q. Can you state why that meter was installed?

Mr. Robson: Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Q. Why was the meter installed?

Mr. Robson: Objected to as irrelevant and not binding on us.

Objection overruled; exception.

A. I suppose the meter was installed primarily to measure the water. We had an extra meter put in because we required more water than we could get through the other pipes.
Q. Did you also pay for the installation of a new water service pipe?
A. I believe so.

Mr. Robson: I move to strike out any evidence in reference to payment for the meter or service pipe on the ground that those were not part of the charges imposed.
The Court: You don't need to move to strike it out.

35 Cross-examination.

By Mr. Robson:

Q. You say you occupied the premises until June 4th, 1914?

A. I may explain that these involuntary bankruptcy proceedings were started against me in June, 1914, and I assume I gave up the premises at that time because I, as a matter of fact, did not really use them after that, but it seems, under the law, that I can be held for the balance of the lease, so as a matter of fact——

Q. Did you actually, physically occupy the premises after that date?

A. I was there off and on, yes.

Q. Who was using part of the water—who was that sub-lessee?

A. I sub-let the top floor to a wool shrinker. I don't recollect his name.

Q. Was that during the entire period between the commencement of your lease and the date of your bankruptcy?

A. No, that only took place for about three years of the lease, to the best of my knowledge.

Q. You know there was a provision in your lease by which you were to pay the water charges, or else they were to be added to the rent?

A. I understood I was to pay the——

The Court: Well, it is paragraph 2nd?

The Witness: Yes.

Q. Was it with the knowledge of the lessor that you were going to put in a new meter and pay for the water?

A. Not so far as I know.

Q. Didn't you have a talk about the lease at the time it was executed?

A. The lease, yes.

Q. And was some of the terms discussed between you and
36 the owner of the property?

A. Not at all. It was not discussed at all.

Q. The lease was given to you by the plaintiff in this action, the lessor, wasn't it, for you to sign?

A. It was given to me by Daniel Birdsall, agent for the owner. I never saw the owner.

Q. Did the owners sign the lease?

A. They must have, I assume.

The Court: You accepted it and signed it as it was put up to you?

The Witness: Yes.

Q. And it was signed also by the landlord, the plaintiff in this action?

A. I assume it must have been.

Mr. Aron: It is stipulated that it was executed.

Redirect examination.

By Mr. Aron:

Q. Did any one else occupy the building from June, 1914, to January 1st, 1915?
A. No, no one.

Plaintiff rests.

Mr. Robson: Defendant rests and moves to dismiss.
The Court: You don't need any such motion as that in an equity case.

Exhibits.

DEFENDANT'S EXHIBIT A.

Statement of Water Consumed printed in the decision herein as Finding "X," at folio 73. (See side p. 25.)

37 *Stipulation That the Case Contains All the Evidence.*

Supreme Court of the State of New York, Appellate Division, First Department.

CORNELIA A. DUNBAR, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action, and that the same be settled, signed and ordered on file and annexed to the judgment roll herein, and that the foregoing printed copy be ordered to be filed in the office of the Clerk of the County of New York, in lieu of the engrossed copy required by the Rules.
Dated, New York, N. Y., June 6, 1916.

BRIDGES, BACON, ARON & VANDERVEER,
Attorneys for Plaintiff-Appellant.

LAMAR HARDY,
Attorney for Defendant-Respondent.

38 *Waiver of Certification.*

Supreme Court of the State of New York, Appellate Division, First Department.

CORNELIA A. DUNBAR, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

Pursuant to Section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing are true copies of the judgment roll, the

notice of appeal and the case and exceptions, containing all the evidence, which are on file in the office of the Clerk of the County of New York; and that certification thereof, pursuant to Section 1353 of the Code of Civil Procedure, be and the same hereby is waived.

Dated, New York, N. Y., June 6, 1916.

BRIDGES, BACON, ARON & VANDERVEER,
Attorneys for Plaintiff-Appellant.

LAMAR HARDY,
Attorney for Defendant-Respondent.

39 *Order Settling Case.*

Supreme Court of the State of New York, Appellate Division, First Department.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

Pursuant to the foregoing stipulation the foregoing case, containing all the evidence, is hereby settled and signed by me and ordered to be filed in lieu of the engrossed copy required by the rules and annexed to the judgment roll herein.

Dated, New York, N. Y., June 7, 1916.

H. D. HOTCHKISS,
J. S. C.

40 *Order Filing Case.*

Supreme Court of the State of New York, Appellate Division, First Department.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, in the First Judicial Department.

Dated, New York, N. Y., June 7, 1916.

H. D. HOTCHKISS,
J. S. C.

41 *Order of Affirmance on Appeal from Judgment Entered on Decision of the Court.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department, in the County of New York, on the 20th Day of April, 1917.

Present:

Hon. John Proctor Clarke, Presiding Justice;
" Frank C. Laughlin,
" Victor J. Dowling,
" Vernon M. Davis,
" Clarence J. Shearn,
Justices.

1074.

CORNELIA A. DUNBAR, Applt.,

vs.

THE CITY OF NEW YORK, Respt.

An appeal having been taken to this Court by the plaintiff from the judgment of the Supreme Court entered on the 11th day of April, 1916; and said appeal having been argued by Mr. Harold G. Aron, of counsel for the appellant, and by Mr. William H. King, of counsel for the respondent; and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby in all things affirmed, and that the respondent recover of the appellant the costs of this appeal.

42 *Judgment of Affirmance on Appeal to the Appellate Division of the Supreme Court.*

New York Supreme Court, County of New York.

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

The plaintiff in the above entitled action having appealed to the Appellate Division of the New York Supreme Court in and for the First Department from the judgment herein entered and filed in the office of the Clerk of the County of New York on or about the 11th day of April, 1916, dismissing the complaint herein on the merits and for the sum of $66.85 costs, and the said appeal having been duly argued at the said Appellate Division, and an order having been duly entered in the office of the Clerk of said Appellate Division, on or about the 20th day of April, 1917, and a certified copy thereof having been duly filed in the office of the Clerk of the County of New York, on or about the 24th day of April, 1917, unanimously affirming in all things the said judgment so appealed from with costs of the appeal to the defendant, and the costs of the defendant having been duly taxed at the sum of $77.20.

43 Now, on motion of Lamar Hardy, Corporation Counsel, attorney for defendant, it is unanimously

Adjudged that the said judgment so appealed from be and the same hereby is in all things affirmed, and it is further

Adjudged that the defendant The City of New York recover of the plaintiff Cornelia A. Dunbar the sum of $77.20, the amount of said defendant's costs as taxed, and that said defendant have execution therefor.

Dated, New York, May 8, 1917.

[L. S.] WM. F. SCHNEIDER, *Clerk.*

Notice of Appeal to Court of Appeals.

New York Supreme Court, New York County.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

CITY OF NEW YORK, Defendant-Respondent.

Please take notice that the above named plaintiff hereby appeals to the Court of Appeals from the order of the Appellate Di-
44 vision of the Supreme Court, in and for the First Department in the above entitled action in favor of the defendant and against the plaintiff, entered in the office of the Clerk of the County of New York on the 24th day of April, 1917, affirming a judgment in said action entered in the office of the Clerk of the County of New York on the 11th day of April, 1916, in favor of the defendant and against the plaintiff, and from the judgment of affirmance and for the sum of Seventy-seven and 20/100 ($77.20) Dollars costs, entered thereon in the office of the Clerk of the County of New York on the 8th day of May, 1917, and also affirming a judgment dismissing the complaint herein which said judgment was duly entered in the office of the Clerk of the County of New York on the 8th day of May, 1917, and the plaintiff appeals from each and every part of the said order and judgment and from the whole thereof.

Dated the 13th day of June, 1917.

Yours, etc.,

ARON & WISE,
Attorneys for Plaintiff-Appellant.

To Lamar Hardy, Esq., Attorney for Defendant-Respondent; and Clerk of the County of New York.

45 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, First Department, April, 1917.

John Proctor Clarke, P. J.
Frank C. Laughlin,
Victor J. Dowling,
Vernon M. Davis,
Clarence J. Shearn, JJ.

No. 1074.

CORNELIA A. DUNBAR, Appellant,

vs.

THE CITY OF NEW YORK, Respondent.

Appeal from Judgment, Entered upon a Decision After Trial at Special Term, Dismissing Complaint.

Harold G. Aron, for Appellant.
William H. King, for Respondent.

SHEARN, *J.*:

This is an appeal by plaintiff from a judgment of the Special Term dismissing the complaint in an action brought to cancel a lien for water charges in favor of the defendant the City of New York and against the property of the owner.

The charges were determined from readings of two meters on the premises, one installed under a permit issued December 3, 1900, and the other under a permit issued in 1907. Such charges in
46 accordance with the provisions of the charter became a lien against the property (New York University vs. American Book Co., 197 N. Y., 294). Plaintiff's claim is that the enforcement of the lien deprives the plaintiff of her property without due process of law.

Plaintiff is and has been for many years the owner of the premises 34 to 36 North Moore Street, Borough of Manhattan. On October 1, 1907, plaintiff executed a lease in writing of the entire premises to the firm of William Hills, Jr., a copartnership, for business purposes. The lease required the lessee to pay all Croton charges. It further provided that the lessee should operate and maintain the engine, boiler and elevators in the demised premises at their own cost and expense. Plaintiff's position is that as this water was sold by the City to the tenant through a meter the charge is not a tax, but is a mere debt. This is correct. Plaintiff's position further is that her property could not be taken from her to satisfy her tenant's debt without her consent. This is also correct. Plaintiff further claims that as the City has the right to meter a building without the

consent of the owner and as this water was furnished through meters and there is no proof that the plaintiff consented to the installation of the meters, there is nothing to show that the plaintiff assented to the City's furnishing water to the tenant. This is not correct. It is true that the City may meter the premises without the consent of the owner, but the meters are not the instrumentalities for furnishing the water. They are merely for the purpose of measuring the water. The water is furnished through pipes connecting the building with the City's mains. These pipes were installed by
47 the owner of the building, if not by the present owner, the plaintiff, then by her predecessor in title and the connection was never shut off or disconnected by the plaintiff. The only purpose of maintaining a connection between a building and the City's water mains is to have the City supply the building with water. The lease, as we have seen, contemplated the tenant's using water in the building. Indeed, it was necessary, for boilers are only useful when supplied with water and the tenant was obligated to maintain and operate the building's engine and boilers. When an owner expressly consents to the tenant's using water in the building, supplied through pipes installed by the owner, or continued by the owner, for the purpose of connecting the building with the City's water main, the owner assents to the City's supplying water to the tenant for the use in the building. When such assent or arrangement is made, it must be deemed to be made with a view to the existing law. Indeed, the law is a part of every contract. The law provided that the charges for water supplied to the tenant for use in the building should be a lien upon the building. Therefore, the charge was incurred and the lien became operative with the assent of the plaintiff and the claim that her property was taken without due process of law because of lack of her assent falls to the ground.

It is also urged that because the Court of Appeals in the Book Company case above referred to used the expression that the tenant was "primarily" liable, the owner is only liable as a surety and this required express assent in writing before the plaintiff could be charged for the debt of another. The Court did not hold
48 that the relation of suretyship existed or that the obligation of the owner was that of a surety and to be con-trued according to the rules — suretyship. It said that the tenant was primarily liable, which is true, but under the statute both the tenant and the owner are liable. Where two are liable, and one is said to be primarily liable, that does not necessarily mean that the other is liable as a surety. In the case at bar the tenant is liable to the City primarily for the water consumed, and the owner's property is also liable under the statute for water furnished to the tenant for use in the building with the owner's assent. Water so supplied is for the benefit of the owner as well as for the benefit of the tenant where the tenant's business and use of the building necessarily requires water, for if there had been no water supply available, there would have been no lease.

The judgment is affirmed with costs.

All concur.

49 *Stipulation Waiving Certification.*

Supreme Court of the State of New York, County of New York.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the foregoing are true and correct copies of the record on appeal, herein to the Appellate Division of the Supreme Court First Department, of the order of affirmance of said Appellate Division thereon, of the judgment of affirmance entered thereon and of all papers before the Appellate Division upon which said order and judgment was founded, and of the notice of Appeal therefrom to the Court of Appeals, and of the whole thereof, now on file in the office of the Clerk of New York County, and the certification thereof, pursuant to Sections 1315 and 3301 of the Code of Civil Procedure, by the Clerk of the County of New York, is hereby waived.

Dated, New York, June 28th, 1917.

ARON & WISE,
Attorneys for Plaintiff-Appellant.

LAMAR HARDY,
Attorney for Defendant-Respondent.

Compared 7/5/17.
E. F.

Undertaking given.
H. G.

50 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Court of Appeals Hall, in the City of Albany, on the 26th Day of March, in the Year of Our Lord One Thousand Nine Hundred and Eighteen, Before the Judges of said Court.

Witness Hon. Frank H. Hiscock, Chief Judge, Presiding.

R. M. BARBER, *Clerk.*

Remittitur: March 27, 1918.

50a CORNELIA A. DUNBAR, Appellant,

agst.

THE CITY OF NEW YORK, Respondent.

Be it remembered, that on the 13th day of July, in the year of our Lord one thousand nine hundred and seventeen, Cornelia A. Dunbar, the appellant in this cause, came here into the Court of Appeals, by Aron & Wise, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department and the City of New York the respondent in said cause, afterward appeared in said Court of Appeals by Lamar Hardy, its attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Harold G. Aron of counsel for the appellant, and by Mr. William H. King, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs, on opinion of Shearn, J., at Appellate Division.

And it was also further ordered that the record aforesaid and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

50b Therefore, it is considered that the said judgment be affirmed, with costs, etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the Judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

50c Court of Appeals, Clerk's Office,

Albany, March 27, 1918.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

50*d* At a Special Term, Part II, of the Supreme Court, Held in and for the County of New York, at the Court-house in said County, on the 1st Day of April, 1918.

Present: Hon. Henry D. Hotchkiss, Justice.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

The plaintiff in the above entitled action having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court in and for the First Department herein entered and filed in the office of the Clerk of the County of New York on or about the 24th day of April, 1917, affirming the judgment herein entered and filed in the office of the Clerk of the County of New York on the 11th day of April, 1916, in favor of the defendant and against the plaintiff, and from the judgment of affirmance and for the sum of $77.20 entered thereon in the office of the Clerk of the County of New York on the 8th day of May, 1917, and also affirming the judgment dismissing the complaint herein, which said judgment was duly entered in the office of the Clerk of the County of New York on the 8th day of May, 1917, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment of the Appellate Division of
51 the Supreme Court so appealed from be affirmed with costs on opinion of Shearn, J., at the Appellate Division, and having further ordered and adjudged that the record therein and the proceedings in said court be remitted to the said Supreme Court, there to be proceeded upon according to law;

Now, upon reading and filing the said remittitur and on motion of William P. Burr, Corporation Counsel, attorney for defendant, it is

Ordered and Adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court, and it is further

Ordered and Adjudged that the said judgment of the Appellate Division of the Supreme Court so appealed from be and the same hereby is affirmed with costs, on opinion of Shearn, J., at the Appellate Division.

Enter.

H. D. H., *J. S. C.*

51½ Please take notice that an Order, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, April 1, 1918.

Yours, etc.,

WILLIAM P. BURR,
Corporation Counsel.

Municipal Building, Borough of Manhattan, New York City.

To Aron & Wise, Esqs., Attorney- for Plaintiff.

[Endorsed:] County Clerk's Index Number 28452. Year 1915. New York Supreme Court. County of New York. Cornelia A. Dunbar, Plaintiff-Appellant, against The City of New York, Defendant-Respondent. (Copy.) Order on Remittitur and Notice of Entry. William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City. To Aron & Wise, Esqs., Attorneys for Plaintiff-Appellant, 50 Pine St.

52 New York Supreme Court, New York County.

CORNELIA A. DUNBAR, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

The plaintiff in the above entitled action having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court in and for the First Department herein entered and filed in the office of the Clerk of the County of New York on or about the 24th day of April, 1917, affirming the judgment herein entered and filed in the office of the Clerk of the County of New York on the 11th day of April, 1916, in favor of the defendant and against the plaintiff, and from the judgment of affirmance and for the sum of $77.20 entered thereon in the office of the Clerk of the County of New York on the 8th day of May, 1917, and also affirming the judgment dismissing the complaint herein, which said judgment was duly entered in the office of the Clerk of the County of New York on the 8th day of May, 1917, and the said appeal having been duly argued at the Court of Appeals; and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment of the Appellate Division
53 of the Supreme Court so appealed from be affirmed with costs on opinion of Shearn, J., at the Appellate Division, and an order having been duly entered in the office of the Clerk of the County of New York on or about the 1st day of April, 1918, making the order and judgment of the Court of Appeals the order and judgment of this court, and the costs of the defendant having been duly taxed at the sum of $110 31/100.

Now, on motion of William P. Burr, Corporation Counsel, attorney for defendant, it is

Adjudged that the said judgment of the Appellate Division of the Supreme Court so appealed from be and the same hereby is affirmed on opinion of Shearn J. at the Appellate Division, and it is further

Adjudgd that the defendant The City of New York recover of the plaintiff Cornelia A. Dunbar the sum of $110 31/100, the amount of said defendant's costs as taxed and that said defendant have execution therefor.

Dated, New York, April 8, 1918.

[L. S.] WM. F. SCHNEIDER, *Clerk.*

53½ Please take notice that a judgment, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, April 8, 1918.

Yours, etc.,

WILLIAM P. BURR,
Corporation Counsel.

Municipal Building, Borough of Manhattan, New York City.

To Aron & Wise, Esq., Attorney for Pltff.-Applt.

[Endorsed:] County Clerk's Index Number 28452. Year 1915. New York Supreme Court, County of New York. Cornelia A. Dunbar, Plaintiff-Appellant, against The City of New York, Defendant-Respondent. Copy of Judgment and Notice of Entry. William P. Burr, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City. To Aron & Wise, Esq-., Attorney- for Pltff.-Applt. Due service of a Copy of the within Judgment and Notice of Entry is hereby admitted. New York, —— —, 191-. —— ——, Attorney for —— ——, 50 Pine St.

54 Court of Appeals, State of New York.

CORNELIA A. DUNBAR, Plaintiff in Error,

against

THE CITY OF NEW YORK, Defendant in Error.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a a judgment of a plea which is in the said Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit between

Cornelia A. Dunbar, plaintiff-appellant, and plaintiff-in-error, and The City of New York, defendant-respondent and defendant-in-error, wherein was drawn in question a right, privilege or immunity specially set up and claimed under the Constitution of the United States, and the decision was against such right, privilege or immunity, and wherein was drawn in question the validity of an authority exercised under the Statutes of the said State of New York and the Charter of the said City of New York on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity, a manifest error hath happened
55 to the great damage of the said Cornelia A. Dunbar, the plaintiff-in-error, as by her complaint appears:—

We being willing that error, if any, hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given *you*, by you, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. Edward D. White, Chief Justice of the United States, the 21st day of June, 1918.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States
for the Southern District of New York.

Allowed by—
FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

55½ [Endorsed:] M3—52. County clerk's index No. 28452. Year 1915. Supreme Court of the United States. Cornelia A. Dunbar, Plaintiff in Error, against The City of New York, Defendant in Error. Writ of Error. Aron & Wise, Attorneys for Plaintiff-in-Error, 50 Pine street, Borough of Manhattan, New York City. Due service of a copy of the Within is hereby admitted this — day of May, 1918. —— ——, Corporation Counsel. A copy of the within paper has been this day received at the Office of the Corporation Counsel. Jun- 21, 1918. William P. Burr, Corporation Counsel. Received June 24, 1918. —— ——.

56 Court of Appeals, State of New York.

CORNELIA A. DUNBAR, Plaintiff in Error,

against

THE CITY OF NEW YORK, Defendant in Error.

Petition for Writ of Error.

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals:

The Petition of Cornelia A. Dunbar, respectfully shows:—

First. On March 26, 1918, the Court of Appeals of the State of New York made and entered a final order and judgment herein, affirming an order of the Appellate Division of the State of New York, First Department, and affirmed a judgment of the Supreme Court in and for the County of New York, entered in the office of the Clerk of the County of New York, on the 24th day of April, 1917, which said judgment dismissed the complaint of the plaintiff herein upon the merits. Thereafter on the 1st day of April, 1918, the records and proceedings in said cause having been remitted to the said Supreme Court of the State of New York in and for the County of New York, the said final order and judgment of the Court of Appeals were made and entered as the final order and judgment
57 of the said Supreme Court.

Second. The said Court of Appeals of the State of New York is the highest Court of the said State of New York in which a decision in this cause could be had.

Third. By the said final order and judgment entered in the said Supreme Court of the State of New York and the proceedings had prior thereunto in this cause, your petitioner has been denied the guaranty and protection provided for by the Constitution and Laws of the United States and a right, privilege or immunity especially set up and claimed by your petitioner under the said Constitution and Laws has been denied, and the validity of an authority exercised by the City of New York in imposing upon the plaintiff's property a lien for water sold to her tenant, which was drawn in question on the ground of it being repugnant to the Constitution and Laws of the United States was upheld, all of which has been made to appear on the record of the said cause as will more fully appear by an inspection of the said record and of the assignment of errors, which is hereto annexed, marked Exhibit A. and filed with this petition, and from the briefs submitted on behalf of the petitioner to the said Appellate Division and Court of Appeals.

Fourth. The said printed record, which contains a copy of the opinion of the Appellate Division of the Supreme Court of the State of New York for the First Department, on making its said order herein, is submitted herewith, marked Exhibit B., copies of said

briefs submitted by your petitioner to the said Appellate Division and the Court of Appeals are submitted herewith, marked
58 respectively Exhibit C. and Exhibit A. The Federal questions above referred to appear in all of the said briefs and the complaint herein expressly alleges that the lien sought to be vacated is "in violation of the rights of the defendant under the 14th amendment of Section 1 of the Constitution of the United States of America and deprives the landlord of her property without due process of law."

Wherefore, your petitioner prays that a writ of error may issue in the Supreme Court of the United States to the Supreme Court of the State of New York, for the correction of the errors and the reversal of the order and judgment so complained of, that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Supreme Court of the United States, that the said writ operate as a supersedeas; that the amount of security for costs which your petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security, all further proceedings on the part of the said City of New York be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

Albany, N. Y., the 1st day of May, 1918.

ARON & WISE,
Attorneys for Petitioner.

No. 50 Pine Street, Manhattan Borough, New York City.

58½ STATE OF NEW JERSEY,
County of Morris:

I, Elias Bertram Mott, Clerk of the County of Morris and also Clerk of the Court of Common Pleas, holden in and for said County, the same being a Court of record, do hereby certify that Joseph Hinchman, by whom the foregoing affidavit — taken and certified was at the time of taking such affidavit a Notary Public duly commissioned and sworn and residing in said County and State and was as such an officer of this State, duly authorized to take and certify said affidavit as well as to take and certify proofs of acknowledgments of deeds for the conveyance of lands, tenements or hereditaments and other instruments in writing to be recorded in said State; that affidavit is duly executed and taken according to the laws of this State, that full faith and credit are and ought to be given to the official acts of said Notary Public, and that I am well acquainted with the handwriting of said Notary Public, and believe the signature to the instrument to which the certificate is attached is his genuine signature.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Morristown, this 1st day of May, A. D. 1918.

[SEAL.] ELIAS BERTRAM MOTT, *Clerk.*

59 STATE OF NEW JERSEY,
County of Morris, ss:

Cornelia A. Dunbar, being duly sworn, deposes and says that she is the Petitioner herein; that she has read the foregoing Petition and knows its contents; that the same is true of her own knowledge except the matters therein stated to be alleged upon information and belief and that as to those matters she believes it to be true.

CORNELIA A. DUNBAR.

Sworn to before me this First day of May, 1918.

JOSEPH HINCHMAN,
Notary Public of New Jersey.

The Writ of Error as prayed for in the foregoing Petition is allowed and the bond is fixed at the sum of $1,000.00.

Dated: Albany, N. Y., the 6th day of May, 1918.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

59½ [Endorsed:] County clerk's index No. —, Year —. Court of Appeals, State of New York. Cornelia A. Dunbar, Plaintiff in Error, against The City of New York, Defendant in Error. Petition for Writ of Error. Aron & Wise, Attorneys for Petitioner, 50 Pine street, Borough of Manhattan, New York City.

60 EXHIBIT A.

Court of Appeals of the State of New York.

CORNELIA A. DUNBAR, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

Assignment of Errors.

Now comes the above named Cornelia A. Dunbar and, in connection with the petition for a writ of error filed by her herewith, says that in the records and proceedings in this cause, and in the final order and judgment made and entered herein on the first day of April, 1918, by the Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit: That the judgment herein entered was illegal and void in that it deprived and threatens to deprive the above named Cornelia A. Dunbar of her property without due process of law and denied to her the equal protection of the law in violation of the 14th amendment to the Constitution of the United States in subjecting the property of the said plaintiff to a lien for an

indebtedness incurred by a copartnership doing business under the firm name and style of William Hills, Jr., which at the time of the incurring of the indebtedness was a tenant under a written lease of premises owned by the said Cornelia A. Dunbar; that the obligation for the water furnished by the defendant and for which a
61 lien upon the plaintiff's property is claimed, was solely the obligation of the said tenant and arose out of a contract between the City of New York and the said William Hills, Jr., to which the plaintiff herein was in no way a party and in no manner or form bound thereby; that the water consumed upon the said premises for which the lien is sought to be imposed upon the plaintiff's property was consumed entirely and solely by the said tenant; that the meters installed in the said premises for the sale of said water were installed by the defendant without the consent, either express or implied, of the said plaintiff and that the said plaintiff was without power to resist or prevent the installation of said meters or the sale of water to the said tenant in such amount as the City of New York was willing to sell to the said tenant; that the plaintiff herein at no time directly or indirectly, in writing or otherwise, guaranteed or assumed the payment of the said indebtedness of the said William Hills, Jr., to the City of New York for water consumed in the demised premises; that the effect of the judgment heretofore entered herein is to subject the plaintiff's land to a lien and public sale for the payment of a debt for which the plaintiff is not liable and deprives the plaintiff of her property without her consent and without notice and without due process of law, and generally to deprive the plaintiff of the use, enjoyment and profits of her property and the essential attributes of its enjoyment and the ownership thereof.

Wherefore, the said Cornelia A. Dunbar prays that the final order and judgment of the said Supreme Court of the State of New
62 York, entered in the office of the Clerk of the County of New York on the 8th day of April, 1918, pursuant to the said remittitur of the said Court of Appeals of the State of New York, be reversed, and that judgment be rendered herein in favor of the plaintiff in error and annulling the said judgment and cancelling the lien sought to be imposed upon her property by the City of New York, with costs in all the Courts.

ARON & WISE.
Attorneys for Plaintiff in Error.

No. 50 Pine Street, Manhattan Borough, New York City.

62½ [Endorsed:] County Clerk's Index No. —. Year —. Court of Appeal of the State of New York. Cornelia A. Dunbar, Plaintiff, against The City of New York, Defendant. Assignment of Errors. Aron & Wise, Attorneys for Plaintiff, 50 Pine Street, Borough of Manhattan, New York City.

63 Supreme Court of the United States.

CORNELIA A. DUNBAR, Plaintiff in Error,

against

THE CITY OF NEW YORK, Defendant in Error.

UNITED STATES OF AMERICA:

The President of the United States of America to the City of New York and W. P. Burr, Esq., Corporation Counsel, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York for the County of New York, in an action wherein Cornelia A. Dunbar is the plaintiff-in-error, and you are the defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error, as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals, this 14 day of June, 1918, and the Independence of the United States of America, the one hundred and forty-second year.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

63½ [Endorsed:] County Clerk's Index No. —. Year —. Supreme Court of the United States. Cornelia A. Dunbar, Plaintiff in Error, against The City of New York, Defendant in Error. Citation. Aron & Wise, Attorneys for Plaintiff, 50 Pine Street, Borough of Manhattan, New York City.

64 American Surety Company of New York.

Capital $5,000,000.

Company's Office Building,

100 Broadway, New York.

Know All Men by These Presents, That we, Cornelia A. Dunbar, of Morristown, State of New Jersey, as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto the City of New York, in the true and just sum

of One Thousand Dollars ($1,000), to be paid to the said, the City of New York, its successors and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, firmly, by these presents.

Dated this 9th day of May, One thousand nine hundred and eighteen.

Whereas, on the 26th day of March, 1918, the Court of Appeals of the State of New York, made and entered a final order, and a judgment herein, affirming an order of the Appealate Division of the State of New York, First Department, and affirmed a judgment of the Supreme Court, in and for the County of New York, entered in the office of the clerk of the County of New York, on the 24th day of April, 1917, which said judgment dismissed the complaint of the plaintiff herein upon the merits. Thereafter on the 1st day of April, 1918, the records and proceedings in said cause having been remitted to the said Supreme Court of the State of New York, in and for the County of New York, the said final order and judgment of the Court of Appeals were made and entered as the final order and judgment of the said Supreme Court; and the said plaintiff in error having obtained from the chief judge of the Court of Appeals of said state a writ of error, and filed a copy thereof in the clerk's office of said court to reverse said judgment in the aforesaid suit, and a citation directed to said the City of New York, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days *within* the date thereof.

Now, therefore, the condition of the above obligation is such, that if the said Cornelia A. Dunbar shall prosecute said writ of error to effect, and answer all damages and costs, if she fails to make her plea good, then the above obligation to be void, otherwise to remain in full force and effect.

CORNELIA A. DUNBAR. [L. S.]
AMERICAN SURETY COMPANY OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice-President.

Attest:
R. L. NEPTUNE,
[L. S.] *Resident Assistant Secretary.*

Approved June 14, 1918.

FRANK H. HISCOCK,
Chief Judge Court of Appeals,
State of New York.

65 STATE OF NEW YORK,
County of New York, ss:

On this day of May 9, 1918, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety

Company of New York, to me known, who, being by me duly sworn did depose and say that he resides in the City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Resident Vice President further said that he is acquainted with R. L. Neptune and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Resident Assistant Secretary subscribed to the said instrument is in the genuine handwriting of the said Resident Assistant Secretary and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Resident Vice President.

[L. S.] WM. A. GEORGI,
Notary Public, Kings County, No. 225;
Kings County Register's No. 9111.

Certificate filed in New York County No. 317; New York County Register's No. 9957. Certificate filed in Bronx County No. 21; Bronx County Register's No. 969. Certificate filed in Queens, Richmond and Westchester Counties. Commission expires March 30, 1919.

66 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 15, 1918, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 11, 1917, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for

* * * * * * *

Place.	Resident Vice-Presidents.	Resident Assistant Secretaries.
New York, N. Y.	Marshall L. Brower.	Marshall L. Brower.
	A. E. Cotterell.	A. E. Cotterell.
	William M. Tomlins, Jr.	Charles S. Waterbury.
	Lester S. Moore.	Daniel Stewart.
	W. H. E. Reinecke.	E. D. Sadler.
	E. D. Sadler.	W. H. E. Reinecke.
	C. S. Waterbury.	E. J. Sabater.
	J. L. Tuthill.	Louis Papen.
		Robert L. Neptune.
		M. E. McGuire.
		J. L. Tuthill.
		Geo. W. Acritelli.
		Charles A. Stumpf.

* * * * * * *

"Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice-Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, H. E. Ising, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that

the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 24th day of January, 1918.

[SEAL.] H. E. ISING,
Assistant Secretary.

67 STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 24th day of June, 1918, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 66 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of Co-nelia A. Dunbar, Plaintiff-Appellant, against The City of New York, Defendant-Respondent, mentioned in said Writ of Error, as the same remain of record and on file in my office;

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 25 day of June, 1918.

[NEW YORK SEAL.] WM. F. SCHNEIDER, *Clerk.*

Endorsed on cover: File No. 26633. New York Supreme Court. Term No. 547. Cornelia A. Dunbar, plaintiff in error, vs. The City of New York. Filed July 2d, 1918. File No. 26633.

Supreme Court, U. S.
FILED
OCT 29 1919
JAMES D. MAHER,
CLERK.

Argued by
Mr. HAROLD G. ARON.

Supreme Court of the United States

OCTOBER TERM—1918.

No. [redacted]160

CORNELIA A. DUNBAR,
Plaintiff-in-Error,

vs.

THE CITY OF NEW YORK,
Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

HAROLD G. ARON
and HENRY M. WISE,
Counsel for
Plaintiff-in-Error.



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Argued by
MR. HAROLD G. ARON.

Supreme Court of the United States

OCTOBER TERM—1918.

No. 547.

CORNELIA A. DUNBAR,
Plaintiff-in-Error,

vs.

THE CITY OF NEW YORK,
Defendant-in-Error.

GENERAL STATEMENT.

This appeal presents the question left open by this Court in Provident Institution vs. Jersey City decided in 1885, reported 113 U. S., 506, opinion of Mr. Justice Bradley. It was there decided that the municipality of Jersey City, through its statutory lien for water charges, could, sustain a priority over a subsequent mortgage without violating the Fourteenth Amendment of the Federal Constitution. The Court there said:

> "When the complainant took its mortgages, it knew what the law was: * * * It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction. The cases referred to by counsel to the contrary holding void a consent exacted contrary to the constitution, have no bearing upon the present case."

We propose upon this appeal to show that the position of an *owner* of real property in the *City of New York* under its present charter is deprived of property without due process of law by the provisions of the charter which exact, contrary to the Constitution an obligation from the owner to subject his land to the payment of liens for water sold by the City directly and solely to a tenant; that the enforcement of this lien by the City upon the faith of these charter provisions imposes on all owners of real property in the City of New York a waiver of a constitutional right as a condition of doing a lawful act, namely the demising of their land and buildings; and further that in being thus restrained in their right to make leases, they are deprived of one of the essential attributes of property and thereby of their property within the constitutional prohibition; and finally, that to thus penalize the owner in the legitimate and only use he may make of his land upon the fiction that he consents to be bound by the Statute from the fact that he leases the land

is as unconstitutional as would be an act making the owners of land liable for coal or groceries delivered to the tenant, simply because at the time of making the lease such a Statute was in force.

Question Involved.

1. The constitutional validity of Sections 473 and 475 of the Charter of the City of New York as affected by the Fourteenth Amendment of the Constitution.

Statement of Facts.

The action was begun in the Supreme Court of New York State on April 26, 1916, and is a statutory proceeding under its Code of Civil Procedure (Sec. 1638) to cancel a lien claimed by the City of New York for water which the City sold through meters *to the plaintiff's lessee* at 34 North Moore Street, New York City.

The trial Court at Special Term, decided in favor of the City, the opinion of Mr. Justice Hotchkiss holding as follows:

> "The question in the case at bar is whether the lien imposed upon the land for metered water used by the plaintiff's tenant without her express consent is valid. On the theory of implied consent I think the answer must be in the affirmative"—citing
>
> Provident Institution vs. Jersey City, 113 U. S., 506;
> Hill vs. Thompson, 50 N. Y. Sup. Ct. Rep., 165;
> City of East Grand Forks vs. Luck, 97 Minn., 373.

The Appellate Division of the Supreme Court affirmed the judgment in an argumentative opinion, devoid of authorities, except on one undisputed point.

The Court of Appeals affirmed the judgment without opinion, and then by its Chief Judge, Hon. Frank H. Hiscock, allowed the writ of error now here.

The complaint alleged that "the said alleged lien is in violation of the right of the defendant under the 14th Amendment, Section I of the Constitution of the United States and deprives the landlord of her property without due process of law."

The premises affected are owned by the plaintiff in fee simple and are described as improved property in deeds antedating 1845.

In 1907 the plaintiff entered into a written lease (Pages 6 and 7) of these premises with a copartnership, known as William Hills, Jr., which provided among other covenants by the lessee: *To pay whenever called upon all charges for Croton Water which are or may be assessed or imposed on said building, according to law, during the term of this lease, and if not so paid, the same shall be added to the rent then due or to become due."*

In 1914, prior to the expiration of the lease, the tenants were declared bankrupts. At the time of the filing of the petition they were indebted to the City of New York for $379.89 for water supplied to them through two meters which the City had installed in the property. The second meter was installed by the tenants on their own application without the plaintiff's knowledge or consent, because according to the tenant's testimony "we re-

quired more water than we could get through the other pipes." The first meter was installed in 1900 on a permit issued to one John Ford, as to which there is nothing in the record showing who applied therefor. The greater part of the water for which the lien is claimed was sold through the second meter.

The City proved no claim in bankruptcy against William Hills, Jr. The plaintiff here, in the bankruptcy proceeding, moved for an order directing the trustee in bankruptcy to pay these water charges as a tax entitled to preference under the Bankruptcy Act. This was properly denied and the United States Circuit Court of Appeals (Ward, Lacombe and Coxe, J. J.) wrote as follows:

> "The obligation of the bankrupts to the City not being a tax but merely a debt, is not entitled to the priority given to taxes. The City makes no claim. If it were to do so it could only be as a general creditor. **Whether the City has a right to impose a lien upon the landlord's premises for the debt of a tenant is a question which does not arise here and must be settled between the landlord and the City."**

Specification of Errors,

1. The Trial Court erred in its Conclusions of Law numbered II, III and IV, page 14 of the Record and particularly in that it finds in Conclusion number II, "That the imposition of the said charge

and lien against the said premises is not in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and does not deprive the plaintiff of his property without due process of law."

2. The judgment of the Court of Appeals, page 27 of the Record, affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, which had affirmed the judgment entered in the Decision of the Trial Court is in error and should be reversed, because based on the foregoing finding.

Statement of Law.

Subsequent to the making of the lease and prior to the bankruptcy of William Hills, Jr., the Court of Appeals of New York in New York University vs. American Book Co., 197 N. Y., 294, 297, decided as follows:

> "The City of New York under the charter (Sec. 473) is authorized to adopt either of two distinct methods of compensating or reimbursing itself for furnishing water to its inhabitants. *The first is by the exercise of the power of taxation; the second, by sale* * * * By Section 475 the Commissioner of Water Supply is authorized to place meters in certain classes of buildings and the charge made depends solely upon the quantity of water used. In this class of cases there is merely a voluntary purchase by the consumer from the City of such quantity of water as he choses to buy (Silkman vs. Bd.

of Water Commissioners, 152 N. Y., 327) and the obligation to pay therefor must primarily rest upon him who buys and consumes the article. As the sale by the City is necessarily on credit, as security for the payment of the debt, a lien is imposed on the property itself for any unpaid charge. The plaintiff's property being thus pledged for the security of the defendant's debt, the plaintiff occupied the position of a surety, and on payment of the City's claim, was subrogated to its rights against the defendant."

The issue before this Court is therefore a narrow one, for as has been said and reiterated in this Court—"The construction given to a Statute of a State by the highest judicial tribunal of such State is regarded as a part of the Statute and, is as binding upon the Courts of the United States as the text."

Leffingwell vs. Warren, 2 Black, 599, 603.

The issue is further narrowed by the fact that no contention is made that the City's statutory lien violates the Constitution because of an impairment of contractual rights.

And still further limited by the decision of this Court in Provident Institution vs. Jersey City, above referred to and the fact that the State Courts have decided against the plaintiff solely upon the ground stated in that opinion.

In its opinion, the Appellate Division of the New York Supreme Court wrote as follows in the case at bar:

"When an owner expressly consents to the tenant's using water in the building, supplied through pipes installed by the owner, or continued by the owner, for the purpose of connecting the building with the City's water main, the owner assents to the City's supplying water to the tenant for the use in the building. When such assent or arrangement is made, it must be deemed to be made with a view to the existing law. Indeed, the law is a part of every contract. The law provided that the charges for water supplied to the tenant for use in the building should be a lien upon the building. Therefore, the charge was incurred and the lien became operative with the assent of the plaintiff and the claim that her property was taken without due process of law because of lack of her assent falls to the ground."

POINT I.

The statute in question does not purport to be nor is it an exercise of governmental power by the municipality; the statute does not impose any liability on the owner, nor does it give the owner any right to resist the action of the City in changing the water supply from an assessment to a consumption basis.

Before setting forth the provisions of the charter under which the present liens are sought to be sustained, we respectfully submit the following propositions:

FIRST.—That when engaged in the sale of water *on a consumption basis*, a municipality has no greater immunities or powers than a private corporation similarly engaged. The City has not thus far made any effort to sustain its lien on any theory of taxation and we assume the proposition now stated may be accepted as axiomatic of municipal corporations when engaging in non-governmental functions. *Hence, if the City's lien is here good, a similar lien may be validly imposed upon the owners land for coal or other commodities purchased by the tenant from any individual or private corporation.*

SECOND.—That the Statute does not make the owner liable appears from the reading thereof.

THIRD.—Under the Statute the installation of meters rests in the sole discretion of the City officials, hence it results that an owner, as here, who has connected with City waters when the charges are being assessed, is without power to prevent the City changing to a consumption basis and extending any amount of credit to the tenant for water used. The owner can hardly be held to have consented to a condition which, under the Statute, he is without power to refuse.

The sections of the City Charter read as follows:

Section 473:

> "The board of aldermen shall hereafter have all power, on recommendation of the commissioner of water supply, gas and electricity, to fix and to establish a uniform scale

of rents and charges for supplying water by The City of New York which shall be apportioned to different classes of buildings in said City in reference to their dimensions, value, exposures to fires, ordinary use for dwellings, stores, shops, private stables and other common purposes, number of families or occupants, or consumption of water, as near as may be practicable, and modify, alter, amend and increase such sale from time to time and to extend it to other descriptions of buildings and establishments. All extra charges for water shall be deemed to be included in the regular rents, which shall become a charge and lien upon the buildings upon which they are respectively imposed, and if not paid, shall be returned as arrears to the collector of assessments and arrears. Such regular rents, including the extra charges above mentioned, shall be collected from the owner or occupants of all such buildings, respectively, which shall be situated upon lots adjoining any street or avenue in said city in which the distributing water pipes are or may be laid, and from which they can be supplied with water. *Said rents, including the extra charges aforesaid shall become a charge and lien upon such houses and lots, respectively, as herein provided, but no charge whatever shall be made against any building in which a water meter may have been or shall be placed, as provided in this act. In all such cases in which a water meter may have been or shall be placed, in any building as provided in this act, except as hereafter provided, the charge for water shall*

be determined only by the quantity of water actually used as shown by said meters, except as otherwise provided by section four hundred and seventy-five of this act."

Section 475:

"The commissioner of water supply, gas and electricity is authorized, IN HIS DISCRETION, to cause water meters, the pattern and price of which shall be approved by the board of alderman, to be placed in all stores, workshops, hotels, manufactories, office buildings, public edifices, at wharves, ferry houses, stables and in all places in which water is furnished for business consumption, and if authorized thereto by resolution or ordinance of the board of aldermen, in all apartment houses, tenements, flathouses and private dwellings so that all water so furnished therein or thereat may be measured and known by the said department, *and for the purpose of ascertaining the* RATABLE *portion which consumers of water should pay for the water therein or thereat received and used.* Thereafter, as shall be determined by the commissioner of water supply, the *said department shall make out all bills and charges for water furnished by them to each and every* CONSUMER as aforesaid, to whose consumption a meter as aforesaid is affixed in ratable proportion to the water consumed, as ascertained by the meter; except that when by any cause or reason the meter shall fail to register correctly, or shall by any defect cease to record the water passing through it, or where

said meter shall have been removed from a building for repairs, or for any other reason, then the commissioner of water supply, gas and electricity shall be authorized to charge for the water between the interruption of the registry of the water by said meter, at the average daily registration of water indicated by said meter for the period of three months subsequent to its repair or resetting after it has been properly repaired and reconnected to the service pipes on his or her premises or place occupied or used as aforesaid. All expenses of meters, their connections and setting, water rates and other lawful charges for the supply of water shall be a lien upon the premises where such water is supplied as now provided by law. Nothing herein contained shall be construed so as to remit or prevent the due collection of arrearages or charges for water consumption heretofore incurred, nor interfere with the proper liens therefor, nor of charges or rates or liens hereafter to be incurred for water consumption in any dwelling or liens hereafter to be incurred for water consumption in any dwelling house, building, or place which may not contain one of the meters aforesaid. The moneys collected for expenses of meters, their connections and settings shall be applied by the commissioner of water supply to the payment of expenses incurred in procuring, connecting and setting said meters."

POINT II.

There is no contractual relation between plaintiff as owner and the defendant as a vendor of water.

There is nothing in the record to show that the plaintiff ever applied for the purchase of water on a consumption basis. The contrary affirmatively appears, at least as to the second meter, which was installed solely at the tenant's request. The negligence of the City in accepting an application from the tenant is not chargeable to the plaintiff. There was in fact no express contract between these parties.

The Statute under which the City claims its lien did not create a contract between the owner and the City.

FIRST.—Because it in terms imposes no liability on the owner for water consumed; it provides (Section 475) that *"The said department shall make out all bills and charges for water furnished by them to each and every consumer as aforesaid."*

The word "owner" does not occur in the Statute and the City's lien rests solely upon the provision that water rates *"shall be a lien upon the premises where such water is supplied as now provided by law."*

The omission of all reference to the owner at once and finally distinguishes the instant case from City of East Grand Forks vs. Luck, 97 Minn., 373, and Provident Institution vs.

Jersey City, 113 U. S., 506, in each of which the Statute under review expressly provided a *direct liability on the owner* as well as the occupier or consumer.

If one were to strain for a construction which would render the New York Statute constitutional, it might be found in construing the term "premises" to mean the estate of the *consumer* in the physical property, as distinguished from the property itself, although this is not necessary upon the present appeal. As Vice-Chancellor in New Jersey, Mr. Justice Pitney so held in Hudson Savings Inst. vs. Carr-Curran Paper Mills, 58 N. J., 59.

SECOND.—The terms of the Statute preclude the possibility of a contract between the owner and the City for it makes the installation of water meters and the purchase of water on a consumption basis mandatory on the owner and discretionary with the City (Section 475). The owner can neither compel nor resist a change from an assessment to a consumption basis. Particularly is it true of this Statute that "a Statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party" McCoun vs. New York Central & Harlem River Railroad Company, 50 N. Y., page 80.

THIRD.—The only contract as to any water charges is the lease to which the City is not a party, and under which neither the owner nor the City acquired any rights against the other. In the lease the owner did consent to

the tenant using Croton water, but it was Croton water to be supplied on an assessment basis—that is water for which charges were *"to be assessed or imposed on said building."* For such assessment the owner was primarily liable and hence the necessity for an indemnity clause in the lease by which the tenant agreed to pay these assessed charges. But this clause had no possible bearing on charges for metered water sold to the tenant direct, for which he was *primarily* liable. For the latter the owner might, without the aid of any clause in the lease, be subrogated to the City's claim; but for assessed charges the tenant had no liability either to the City or the owner, any more than for other taxes or assessments.

FOURTH.—If the Statute purported to impose a lien on the premises for metered water, the owner had a right to rely upon the fact that no case in the State of New York had then or since sustained the validity of such a lien and the only adjudication bearing on the point was in Moffat vs. Henderson, 50 N. Y. Sup. Ct., 211, where it had been held that if the Statute made the actual consumer liable (as was later decided by the Court of Appeals)—it would be a grave question whether the land of the lessor could be constitutionally subjected to the payment of the personal debt of the lessee." The Court of Appeals having decided in 1910, three years prior to the inception of the charges for which the lien is claimed, that the Statute meant what the earlier case had suggested, the lien became unconstitutional,

the owner properly relied on the then state of
ed to the payment of the personal debt of the
the law in disregarding it, which quite over-
turns any implication of assent to the lien.

POINT III.

The owner did not impliedly consent to make her property surety for another's debt.

If this extreme liability existed, it must be premised upon the fact that she had consented to the use of water by her tenant or had with knowledge of the Statute entered into a contractual relation affected by the Statute.

As to the first premise, the record supports the statement that she had no knowledge of the fact that the City was selling water through meters to the tenant and the lease shows that she believed that the water was being used on an assessment basis. Her liability for assessments was fixed and could not be varied by the tenant's waste or abnormal consumption of water. Therefore, nothing in her transactions with the tenant implied any consent to her buying or the City selling water on a consumption basis.

Whatever the fact may be, the owner is, of course, charged with knowledge of the Statute. But before that Statute could create any liability on her, it must be shown *first* that the Statute is constitutional, and *second*, that she had knowledge that the conditions under which the liability would arise had occurred, namely, the installation of meters and the change from an assessment to a consumption basis.

As to the latter, no such knowledge is shown and in part at least specifically rebutted, and in the absence of such proof, she cannot be held to have made the lease with regard to any such liability, even though she be charged with full knowledge of the Statute.

The State Courts have, however, laid the great stress on the point that the statute was a part of the contract and have relied primarily on the language of this Court in Provident Institution vs. Jersey City.

We do not question the correctness of the decision in the Provident Institution case nor the correctness of the premise that the statute, if valid, became a part of the contract; but we do contend that although a statute has not been *declared* unconstitutional at the time a contract is made, its effect as a part of the contract is utterly destroyed if it is in fact unconstitutional. Or to express it differently, a statute which does take away property rights without due process of law may be disregarded and no estoppel arises to attack its constitutionality merely because it was on the statute books when the contract was made —in short if the legislature was without power to enact the Statute, the Statute is without power to create a liability.

The simple fact is that the opinions below have completely begged the question. We have never argued that the statute did not affect the owner's liability, but have contended that because it did purport to affect the owner's liability it was *unconstitutional.*

We have never contended that under this statute a mortgagee could resist the priority of

the City's lien with any greater success than in the Provident Institution case; but we have contended that the effect of such priority against a mortgagee is vitally different in its effect from the case now here, and that the reasoning so forcefully advanced against the mortgagee states the very ground upon which the lien fails against the owner. The difference in facts between the Provident case and the case at bar are obvious.

THERE the question of the owner's liability was not involved and no contract of letting existed.

THERE the statute in terms made the owner as well as the occupier liable.

THERE the question solely arose because the owner was liable and the City did have a valid lien on the owner's land.

THERE it was a mortgagee's estate which was supposedly confiscated or impaired without due process of law.

HERE the question is, to use the language of the United States Circuit Court of Appeals in an earlier motion in this case,—"Whether the City has a right to impose a lien upon the landlord's premises for the debt of a tenant."

The difference in results of the priority of the liens in the two cases is equally obvious: The mortgagee, as this Court held, is under no obligation to take the mortgage, and loses nothing more than a legal rate of interest in being prevented therefrom, if he does not desire to hazard the priority of a water lien. He acts voluntarily

in taking the security. But the owner has his property to begin with and is left to the choice of losing the use and income from all property which he cannot himself occupy or else gamble that his tenant will not use so much water as to destroy the profit from the letting or possibly eat up the entire value of the freehold.

The mortgagee is perhaps restricted in his power to contract, yet until he voluntarily puts himself within the operation of the statute, he has no property rights of which he can be deprived, but the owner having the property is actually deprived of the use of his property, and upon no theory of police power or common good, for a city engaged in the sale of water has no perogative beyond those of a private corporation and cannot claim the benefit in that capacity of its governmental privileges.

It is beside the point to say that an owner does not have to lease his building. His right to lease his building is itself property of which he cannot be deprived without due process of law. It has been repeatedly held that the legislature cannot, under the Constitution, *impose a waiver of a constitutional right as a condition of doing a lawful act.*

Insurance Company vs. Morse, 20 Wall., 445;
Doyle vs. Continental Ins. Co., 94 U. S., 535.
Cooley, Constitutional Limitations, 393;

and "to deprive an owner of property of one of its essential attributes is depriving him of his property within the constitutional prohibition" is

the language of the very Court from which this appeal comes.

The People ex rel. vs. Otis et al., 90 N. Y., 52, and from the same Court see also Wynehamer vs. The People, 13 N. Y., 378:

> "When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretations, and certainly within the spirit of a constitutional provision, intended expressly to shield private rights from the exercise of arbitrary power."

And in the Matter of Jacobs, 98 N. Y., 105.

> "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

and the case of Rice vs. Culver, in 172 N. Y., 60, 65, which interprets the Mechanics' Lien Law to mean that such a lien is not enforcible where the claim rests merely upon the *passive* acquiescence

of the owner was decided upon the grounds stated by Judge Cullen:

> "It could not have been intended by the legislature (if it had the power) to enact that by the mere demise of land the owner could be subjected to the cost of structure or improvements which the tenant would have the right to erect by virtue of his estate under the lease."

The point is well summarized by Judge Choate in Lavin vs. The Emigrant Industrial Savings Bank, 18 Blatchford's Circuit Court Reports, 35,

> "The position taken, that all persons hold their property subject to existing laws must be conceded, with three very important limitations. Unquestionably, all persons within the jurisdiction of the State hold their property subject to restriction as to use by the exercise, on the part of the State, of the police power already referred to, and, in this sense, subject to the laws of the State, whether enacted before or after the title was acquired. But, the laws must be valid and constitutional laws. The State cannot take away from property the essential character of property. It cannot, under cover of the exercise of the police power, make property already acquired, or thereafter to be acquired, subject to be taken away from its owner without due process of law. It could not pass a general law providing as to all after acquired property, that it should be held on the tenure or condition, that, in certain prescribed cases it should be taken from the owner

and given to another, without any form of judicial proceeding, without notice or an opportunity to be heard."

It is utterly without argumentative force to say that an owner does not have to connect with or use City water. Despite the practical absurdity of such a statement as to commercial property in the City of New York, it has no bearing on the issue. We concede for the sake of argument that a statute might possibly be so drawn, with provisions for notice, etc., as constitutionally to make the owner primarily liable for the tenants metered water charges and that the owner would then connect with or continue the use of City water at its peril. We are dealing with the Statute as it is and that Statute does not make the owner liable but seeks to make her land, in the complete absence of notice, consent or contract, liable for the tenant's debt. While the owner does not have to connect with City water, it is likewise true that the City has by choice elected to do business with the tenant by changing from an assessment basis and installing the meter, and the situation is immediately clarified if we regard this election by the City as controlling; to assess the water and hold the owner or to sell the water and look to the consumer—but it cannot properly do both in bolstering its purely commercial credits by asserting what amounts to nothing more than a governmentally imposed tax lien, where there is no tax, and certainly the lien has no support in the law of contracts.

POINT IV.

No argument founded in law, justice or expediency can be advanced in favor of the City's contention.

In addition to the error as to the important constitutional question involved, the State Courts have completely disregarded the law of suretyship.

> "Suretyship is always a matter of agreement between the parties expressed in terms or implied by their conduct or by circumstances. There is no such thing as principal and surety without a contract relation between them expressed or implied" (Brandt on Suretyship, Sec. 1, pages 7 and 8).
>
> "No one incurs a liability to pay a debt or perform a duty for another unless he expressly agrees to be so bound. The law does not create relations of this character by mere implication. Suretyship arises only in contract, and such a contract to be binding must be entered into for a consideration, must be duly executed between parties competent to contract, and without duress or fear, and must be in writing."
>
> Stearns on Suretyship, Sec. 2, page 2.

Again, the Statute of Frauds, in the State of New York, provides that such a liability shall not arise without a memorandum or writing signed by the party to be charged. In the case at bar, the owner never signed any application for water or the installation of meters or service pipes.

As we have before pointed out, the owner's consent was not expressly or even impliedly given, and a statute purporting to create a liability with-

out such consent is necessarily confiscatory, unconstitutional and void. The effect of such a liability as is here sought to be enforced is to deprive the owner of the power of demising real estate without incurring a liability which may result in its complete confiscation to discharge the tenant's debt to the City.

To escape this undeniable situation, the opinion of the Appellate Division seeks refuge in this statement:

> "It is also urged that because the Court of Appeals in the Book Company case above referred to used the expression that the tenant was 'primarily' liable, the owner is only liable as a surety and this required express assent in writing before the plaintiff could be charged for the debt of another. The Court did not hold that the relation of suretyship existed or that the obligation of the owner was that of a surety and to be construed accordingly to the rules—suretyship. It said that the tenant was primarily liable, which is true, but under the statute both the tenant and the owner are liable. Where two are liable, and one is said to be primarily liable, that does not necessarily mean that the other is liable as a surety."

Yet the Court of Appeals, whose decision must be deemed conclusive, in terms held in the Book Company case, "the plaintiff occupied the position of *surety*," nor does the learned Appellate Division indicate what relationship may exist in the law, other than that of surety, in which there is a primary and secondary liability and an equitable right of subrogation.

The injustice of the lien claimed is revealed in the facts at bar. The owner loses a substantial part of her rent because the City permitted the tenant to buy water on credit, fall in arrears and escape his debts through bankruptcy. She could not limit or prevent this injudicious credit—she was powerless, yet must pay or lose her land, and the owner of real property in the City of New York, cannot lease it without thereby subjecting himself to a liability and his land to a lien, limited only by the full value of the property. He can neither prevent the City from selling water to a tenant, nor limit the credit which the City may extend to the tenant, nor compel the City to proceed against the tenant, whether he be solvent or insolvent, or even prove a claim against the tenant in bankruptcy. The City may extend credit to the tenant up to the full value of the property, and by foreclosing its lien, confiscate the owner's land for a debt of the tenant, which the owner had neither power to prevent nor limit.

The important fact is that the owner's liability is not created by the statute; it arises from the City's election to sell water rather than assess the charges; that election rests solely with the City and the utter injustice is shown in this case, where the City without notice to the owner puts in its meters and voluntarily, without consulting the owner, opens up an unlimited credit for the tenant upon the security of the owner's property.

The natural tendency of the State Courts dealing with their most important municipality is to be moved, consciously or otherwise, by the argument of expediency advanced by the City, "How else are we to collect for metered water." That

argument will hardly have serious consideration in this tribunal in dealing with an important constitutional question, and yet it may be readily answered. An owner leasing property and requiring water to be furnished to his tenant, must comply with the City's terms. The City can fully protect itself by requiring the application for water service to be signed by the owner, and the owner can, in that way, limit the period or the amount for which he consents to be bound, and upon the expiration thereof, the City can shut off the water, requiring in such application an agreement by the owner to meet such extra charges as may be incurred in turning on or off the water. All this may be done under the present charter provision, which is constitutional, if construed to apply only to water furnished to the owner or to his tenant in accord with the owner's written consent and agreement.

Indeed, such seems to have been the construction *actually* placed on the act by the City in the instant case. The application upon which the second meter was installed, was a *printed form* on which opposite the *printed word* OWNER, was signed the name William Hill, Jr., who was in fact the tenant (page 17). That an imposition was worked upon the City entirely without the owner's knowledge or consent (page 12), in no way modifies the result. The very form printed by the City shows that it undertook to obtain the *owner's written consent*.

Respectfully Submitted,

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and HENRY M. WISE,
Counsel for
Plaintiff-in-Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 160.

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

CORNELIA A. DUNBAR,
Plaintiff-in-Error,

against

THE CITY OF NEW YORK,
Defendant-in-Error.

Brief for Defendant-in-Error

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To be argued by
William Herbert King.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1919.

CORNELIA A. DUNBAR, Plaintiff-in-Error, *against* THE CITY OF NEW YORK, Defendant-in-Error.	No. 160.

Writ of Error to the Supreme Court of the State of New York.

Brief for Defendant-in-Error.

General Statement.

The plaintiff-in-error asserts that by the provisions of Sections 473 and 475 of the Charter of the City of New York, whereby a lien is imposed upon real property to which water is furnished by the City, thus enabling the City to obtain payment for water so furnished thereto, the owner is deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution; that the enforcement of such lien requires the owners to waive a constitutional right as a condition of doing a lawful act, namely, demising the real property; and that in being thus restrained in the right to make leases thereof they are deprived of one of the essential attributes of property and are penalized in the legitimate and only use they may make of their real property.

Specifically the plaintiff-in-error claims herein that the lien of the City of New York for charges by meter measurement for water furnished by the City within the period, December 4, 1912, to June 14, 1915, to her premises in the Borough of Manhattan used for business purposes by her tenants, who, in violation of the terms of their lease, failed to pay such charges, is invalid and unconstitutional, and that the charges should be cancelled.

The defendant-in-error contends that the charges in question for the water furnished by the City to the real property and measured by meter, were properly imposed in accordance with the provisions of the New York Charter; that the provisions therein making such charges a lien upon the real property to which the water is furnished were reasonable, valid and constitutional enactments, resulting in no contravention of the provisions of the Fourteenth Amendment; that in connecting and continuing the connection of the premises with the City's water supply, the plaintiff-in-error assented to such provisions and voluntarily accepted the reasonable, valid and constitutional conditions for obtaining water for the premises from the City; that the lien resulted from her own neglect in not requiring her tenants to pay the water charges promptly in accordance with the terms of their lease; and that the necessity and expediency of the statutory provisions are properly for the determination of the State Legislature.

Statement of Facts.

This action was brought by the plaintiff to cancel as charges against her premises Nos. 34-36 North Moore Street, Borough of Manhattan, City of New York, unpaid items aggregating $379.89 for the supply of water thereto within the period December 4, 1912, and June 14, 1915, entered in the books of the

Department of Water Supply of the City and subsequently returned to the Comptroller and sent to the Collector of Assessments and Arrears.

The charges, stated in detail in the decision, (Record, pages 12 and 13) were determined from readings of two meters on the premises; one of which was installed under a permit issued December 3, 1900 (page 12), and the other under a permit issued in 1907 (page 12), and such charges, in accordance with the provisions of the New York Charter, became a lien against the property.

The complaint alleged (page 5) that such lien is void as in violation of the United States Constitution in depriving the plaintiff of her property without due process of law, and stated (page 4) that on October 1, 1907, the plaintiff leased the premises to William Hills and William Hills, Jr., copartners, who, without the knowledge, consent or approval of the plaintiff, used the water furnished by the City, and were in June, 1914, adjudicated bankrupts, and have since been discharged as bankrupts.

The undisputed facts show (page 24) that the plaintiff has been the owner of the premises for a number of years, and on October 1, 1907, executed a lease in writing of the entire premises to William Hills and William Hills, Jr., a copartnership engaged in the general commission business. The lease was for a term of seven years and six months from November 1, 1907, and therein it was provided (page 6):

> "The said lessees for themselves and their legal representatives, do covenant with the said lessor and her legal representatives as follows: * * * Second: To pay whenever called upon all charges for Croton Water which are or may be assessed or imposed on said building, according to law, during the

term of this lease, and if not so paid, the same shall be added to the rent then due or to become due."

On June 20, 1914, the lessees were adjudicated bankrupts in the United States District Court. At the time of the adjudication there were due to the City of New York for water consumed on the premises items aggregating the sum of $355.15. The plaintiff made a motion before a Referee for an order directing the trustee in bankruptcy to pay this sum on the ground that the charge was entitled to *priority* over other claims. The Referee denied the application, and the report of the Referee was confirmed. Upon appeal by the plaintiff, the order confirming the report was affirmed.

The plaintiff then sought in this action to cancel the charge as a lien upon her property.

The contention of the plaintiff before the courts of the State of New York was that the charge is not a valid lien against the premises for the following reasons:

"1st. The water was not consumed by the plaintiff, but by a tenant then in possession, for whose debts the plaintiff was in no wise responsible.

"2d. That the water was furnished without the knowledge, consent or approval of the plaintiff.

"3d. The Charter provisions making the charge for the use of water measured by meter a lien upon the property are in violation of the rights of the plaintiff under the Fourteenth Amendment of Section One of the Constitution of the United States of America, and deprived the plaintiff of her property without due process of law."

The defendant's contentions were:

1. The meters were installed under the authority of the provisions of the Greater New York Charter, with the knowledge and consent of the plaintiff.

(a) The premises were at all times used entirely for business purposes.

(b) The first meter was installed in 1900, with the knowledge and consent of the plaintiff, prior to the commencement of the lease, and when the premises were under the control of the plaintiff, and measured the supply to the entire premises.

(c) The second meter was installed in 1907 in order to make it more convenient to register the water used on the premises.

2. Under the provisions of the Greater New York Charter a charge for water supplied and measured by meter is a valid lien against the premises where the water is supplied, and is prior to all other liens.

(a) The meters showed the full amount of water supplied.

(b) The amount of the charge, $379.89, was fixed and determined from meter readings and the charge was made at a rate fixed by ordinance and in accordance with the provisions of the Greater New York Charter.

3. The imposition of the charge and its becoming a lien against the premises under the provisions of the Charter were not in violation of the rights of the plaintiff under the Fourteenth Amendment of Section 1 of the Constitution of the United States of America.

(a) The plaintiff had knowledge of the fact that water would be consumed and would become a lien, and assented thereto.

(b) The provision in the lease was in fact an attempt by the plaintiff to prevent the charge becoming a lien against her property by failure on the part of the lessees to pay the water charges.

Upon the trial herein the Court at Special Term of the Supreme Court of the State of New York rendered judgment (page 10) upon its decision (pages 11-14) in favor of the City of New York, dismissing the complaint with costs, and in its opinion, after referring to authorities, stated (page 15):

"The question in the case at bar is whether the lien imposed upon the land for metered water used by the plaintiff's tenant without her express consent is valid. On the theory of implied consent I think the answer must be in the affirmative. * * *"

The plaintiff appealed (page 2) to the Appellate Division of the Supreme Court of the State of New York, First Department, from the judgment rendered at the Special Term and the Appellate Division unanimously affirmed the judgment dismissing the complaint on the merits (pages 21-23).

In the opinion of the Appellate Division (pages 24 and 25) the Court, by Mr. Justice Shearn, said:

"* * * Plaintiff's position is that as this water was sold by the City to the tenant through a meter the charge is not a tax, but is a mere debt. This is correct. Plaintiff's position further is that her property could not be taken from her to satisfy her tenant's debt without her consent. This is also correct. Plaintiff further claims that as the City has the right to meter a building without the consent of the owner and as this water was furnished through meters and there is no proof that the plaintiff consented to the installation of the meters, there is nothing to show that the plain-

tiff assented to the City's furnishing water to the tenant. This is not correct. *It is true that the City may meter the premises without the consent of the owner, but the meters are not the instrumentalities for furnishing the water. They are merely for the purpose of measuring the water. The water is furnished through pipes connecting the building with the City's mains. These pipes were installed by the owner of the building, if not by the present owner, the plaintiff, then by her predecessor in title and the connection was never shut off or disconnected by the plaintiff. The only purpose of maintaining a connection between a building and the City's water mains is to have the City supply the building with water. The lease, as we have seen, contemplated the tenant's using water in the building.* * * *

When an owner expressly consents to the tenant's using water in the building, supplied through pipes installed by the owner, or continued by the owner, for the purpose of connecting the building with the City's water main, the owner assents to the City's supplying water to the tenant for the use in the building. When such assent or arrangement is made, it must be deemed to be made with a view to the existing law. Indeed, the law is a part of every contract. The law provided that the charges for water supplied to the tenant for use in the building should be a lien upon the building. *Therefore, the charge was incurred and the lien became operative with the assent of the plaintiff and the claim that her property was taken without due process of law because of lack of her assent falls to the ground."*

Commenting on the contention of the appellant that according to the decision in *New York University* v. *American Book Co.*, 197 N. Y., 294, the owner is only liable as a surety, Mr. Justice Shearn said (page 25):

* * * * * * * *

"The Court (The Court of Appeals of the State of New York) did not hold that the rela-

tion of suretyship existed or that the obligation of the owner was that of a surety and to be construed according to the rules of suretyship. *It said that the tenant was primarily liable, which is true, but under the statute both the tenant and the owner are liable.* Where two are liable, and one is said to be primarily liable, that does not necessarily mean that the other is liable as a surety. In the case at bar the tenant is liable to the City primarily for the water consumed, and the owner's property is also liable under the statute for water furnished to the tenant for use in the building with the owner's assent. *Water so supplied is for the benefit of the owner as well as for the benefit of the tenant where the tenant's business and use of the building necessarily requires water, for if there had been no water supply available, there would have been no lease.*"

On the plaintiff's appeal to the Court of Appeals of the State of New York, the order of the Appellate Division was affirmed (page 27) on opinion of Shearn, *J.*, at Appellate Division Thereafter, upon the petition of the plaintiff, the Chief Judge of the Court of Appeals allowed the writ of error to this Court (page 34).

In support of the judgment appealed from dismissing the complaint on the merits, the defendant-in-error respectfully makes the following:

ARGUMENT.

POINTS.

I.

The meter charges for water supplied were properly imposed and became a lien on the property under the provisions of the Charter of the City of New York, the premises being used for business purposes.

The premises, during the period when the charges in question were imposed, were leased by the plaintiff to be used in the general commission business (page 6), and the two meters measured the supply of water to the entire premises thus metered. The charges, in accordance with the meter readings, were therefore properly imposed under the Charter provisions, and the meters to measure the water, whether placed by order of the Commissioner of Water Supply or upon application, were properly installed therein, the water being required and used for business consumption. And under such provisions, the meter charges imposed and unpaid were enforcible liens against the property.

This clearly appears from the following sections of the New York Charter:

Section 473 provided in part as follows:

> " * * * In all such cases in which a water meter may have been or shall be placed in any building as provided in this act, except as hereinafter provided, the charge for water shall be determined only by the quantity of water actually used as shown by said meters * * *"

Section 475 provided in part as follows:

> "The Commissioner of Water Supply * * * is authorized in his discretion to cause water meters * * * to be placed in all stores * * * and in all places in which water is furnished for business consumption * * * so that all water so furnished therein or thereat may be measured and known by said department, and for the purpose of ascertaining the ratable portion which consumers of water should pay for the water therein or thereat received and used. Thereafter as shall be determined by the Commissioner of Water Supply, said department shall make out all bills and charges for water furnished by them to each and every consumer as aforesaid, to whose consumption a water meter as aforesaid is affixed in ratable proportion to the water consumed as ascertained by the meter * * *. All expenses of meters, their connections and setting, water rates and *other lawful charges for the supply of water shall be a lien upon the premises where such water is supplied* as now provided by law. * * *."

Section 909 of such Charter further provides for the entry on the assessment rolls of all unpaid water rents, expense of meters and other lawful charges for the supply of water.

Section 1017 thereof provides that water rents, expense of meters and other lawful charges for the supply of water measured by meter shall continue to be until paid a lien against the premises against which the same were imposed and shall be preferred in payment to all other charges.

Section 1022 of the Charter provided for the transmission by the Commissioner of Water Supply to the Comptroller of two separate accounts, to wit, one of all lots against which there are any unpaid water rents and the other of all lots against which there are any unpaid meter expenses and lawful water charges for the supply of water by meter.

Section 1024 thereof provides for the entry on the assessment rolls of such unpaid water rents, expenses of water meters and lawful charges for water consumed and measured by meter as arrears under the words "water rents" and for their collection at the same time and in the same manner as the taxes to which they shall be added.

And Sections 1026 and 1027 of the Charter provide for the sale of the City's lien on real property against which the water rents and meter charges remain unpaid for the period of four years in the same manner as the sale of lien where there is nonpayment of taxes.

Every lot to which a supply of water for business purposes was required, thus came within the provisions of the Charter, under which meter charges were to be imposed, which charges became a lien upon the lot.

II.

The provisions of the Charter of The City of New York that unpaid meter charges are enforcible as liens upon property to which water is supplied are reasonable and valid, and in connecting or continuing the connection of the premises with the City's water supply, the plaintiff assented to such provisions.

The condition imposed by the Legislature in the provisions of the Charter, respecting the supply of water by the City of New York to premises by

meter for business purposes, is that, if the meter charges are permitted to remain unpaid, they may be enforced in the same way as a lien for taxes against the property to which the water is so supplied. The statute gives notice to property owners of such condition, and as a municipal regulation the condition is reasonable. In no other practical way can the City be secured for the payment of water supplied to premises which, without said supply, could not be rented or used to the fullest extent by the owner. By the supply of water, a direct benefit is conferred upon the owner, whether the property be used or leased by him, and in exchange for such benefit he is reasonably required to assent to the enforcement against the property of the water charges as measured by meter.

Herein the plaintiff does not claim that the charges in question are inaccurate or excessive. If they were either, the plaintiff could properly resist the charges "as arbitrary or confiscatory." It is argued, however, that they were not imposed as a tax and were an indebtedness of the tenant only, and hence no valid lien therefor can exist against the property owned by the plaintiff. It is insisted that the tenant, not the owner, was the "consumer"; that he was personally liable, and that no contract of suretyship, under which alone the plaintiff's property can be charged, existed.

The plain answer to this argument is, that the owner of the property was the "consumer," in the sense that she received benefit from the supply of water, even though the water supplied was actually used by her tenants, and that while, as held in the case referred to by the appellant of *New York University* v. *American Book Company*, 197 N. Y., 294, *as between landlord and tenant*, the tenant using the water is chargeable therefor, and the amount thereof, if paid to the City by the landlord,

may be recovered of the tenant, the landlord, in connecting the premises or continuing their connection with the City's water supply, thereby assented to such charges if unpaid becoming a lien on the property.

It is to be noted that although in the case cited the rights of the City were not involved or considered, nor was the City of New York a party therein, the Court recognized the validity of the City's lien on the property for the water supplied thereto, saying (p. 297) "as security for the payment of the debt, a *lien* is imposed on the property itself for any unpaid charge. The plaintiff's property being thus pledged, * * * the plaintiff occupied the position of a surety and on payment of the City's claim was subrogated to its rights against the tenant."

Assuming from the Court's analogy that the City's lien rests only upon the law of suretyship, the appellant argues that herein the owner "never signed any application for water," although a written contract is necessary to bind a surety, and it has further contended that "the owner has the right to send the creditor against the debtor on penalty of discharging the surety if the creditor fail to proceed with due diligence," adding that "obviously no such right could be recognized as a practical matter in connection with water charges; for it would mean that every landowner could compel the City, whenever he saw fit, to sue the tenant for water charges—a rule which would lead to a tremendous burden upon the Law Department of the City and result in endless and unnecessary litigation."

The plaintiff was thus dangerously near to recognizing that the City's claim against the property rests not upon the law of suretyship, but upon a

reasonable and valid regulation imposed by the Legislature with respect to enforcing charges for water supplied by meter to premises.

As to the statement of the plaintiff-in-error—which the defendant deems quite irrelevant—that the plaintiff made no application for water, it may be observed that herein the plaintiff presented no proof thereof, it appearing as to the meter installed in 1900 that there was "no evidence to show whether this meter was installed at the request of the owner" (decision, page 12), and that the plaintiff's attorney at the trial stated (page 17): "I cannot stipulate whether the owner made the first application or not. I don't know. I think the meter was put in there at the time she bought the property. * * *"

It is sufficient to say, however, that the plaintiff is presumed to have known the provisions of the Charter when the premises were connected with the City's supply of water, and when the connection was continued, and that herein it appears that she was aware that a supply of water to the premises for business purposes was necessary for their fullest use and rental; that she knew that water was being supplied since 1900 by meter measurement; that charges in accordance with meter readings were paid; and that in 1907 the lease she made *expressly recognized* the liability for charges, as it required her tenants "to pay * * * all charges for Croton water;" and further provided that "if not so paid, the same shall be added to the rent then due or to become due."

Thus long before the tenants were adjudicated bankrupts in 1914, the plaintiff had the right to insist upon the payment of the meter charges previously imposed and could have enforced their collection as rent.

These facts answer the further argument of the plaintiff-in-error (Brief, page 25) that the owner of real property "can neither prevent the City from selling water to a tenant, nor limit the credit which the City may extend to a tenant," for the use and leasing of the property were the owner's own affair. The statute prescribed merely that if property was used for business purposes and water was supplied therefor, the charges would be by meter measurement, and if unpaid they were enforcible in the same way as a lien for taxes against the premises.

Herein water was to be supplied by the municipality if required, at meter rates, upon terms fixed by statute. With knowledge of such terms, the owner connected the premises or continued their connection with the City's mains, thus accepting the terms, and, without questioning the accuracy of the charges or asserting any unreasonable rate, she now seeks to avoid the enforcement thereof as a lien against her property.

The entire argument of the plaintiff-in-error assumes that the owner received no benefit from the supply of water to the premises, the tenants alone receiving the benefit, whereas a distinct benefit was received by the owner; and she ignores the fact that the Legislature may impose reasonable terms and regulations to enforce payment for water supplied by a municipality, and that in connecting premises or in continuing the connection thereof with the City's water supply, an owner consents to such terms and regulations, and his property thereupon becomes liable for unpaid charges imposed in accordance therewith.

The situation is, as stated in *Silkman* v. *Water Commissioners,* 152 N. Y., 327, wherein the Court said (pp. 330, 331):

"It is, perhaps, true that the legislature might have authorized the payment of the cost and expenses of constructing and maintaining the water works by taxation alone, when the plaintiff would have been entitled to the notice and hearing contended for. But, in this case, instead of doing that, it provided for the payment of a great portion of such expenses from a fund to be obtained by charging water rents to the persons by whom the water was used.

"That there is a clear distinction between rents paid for water actually furnished by a corporation and used by an individual, and the payment of a sum in the nature of a tax for an anticipated benefit arising from the presence of water in the city, we have no doubt. * * *

"The authorities cited in effect hold that rents, which are charged for water actually used, are valid, although the rates are established without notice or opportunity to be heard by the person paying them. This is upon the ground of an implied contract between the parties, it being said that as the rates are known to persons applying for a supply of water, when the application is made, it is in effect an assent by the applicant to those terms, and constitutes a contract between the parties."

Similarly, in *Hill* v. *Thompson,* 50 N. Y., Superior Court, 172, the Court said (p. 173):

"The plaintiff is not obliged to have any pipes to furnish water in her premises. Whether or not she takes it rests in her will. If she choose not to have pipes, the defendant cannot place in her premises a meter and cannot subject her building to the danger of the meter leaking or bursting, or to the expense of the meter being a lien upon the real estate. *If she chose to take the benefit to any extent, under the statute, the benefit must be taken, in the form and with the limitations prescribed by the statute.* As the consequences are such

> as she voluntarily assumes, if she allow the water to be furnished at all, there is no ground for arguing that the statute that gives the defendant certain powers or gives a lien for the expense of the meter is unconstitutional * * *."

And as said by the Appellate Division herein (page 25):

> "Water so supplied is for the benefit of the owner as well as for the benefit of the tenant where the tenant's business and use of the building necessarily requires water, for if there had been no water supply available, there would have been no lease."

See also *Provident Institution* v. *Jersey City*, 113 U. S., 506 hereinafter discussed.

III.

As the connection of the premises of the plaintiff-in-error with the City's water supply constituted a voluntary acceptance by her of the reasonable statutory conditions upon which water might be obtained from the City, the lien provided by the statute, as a condition of the connection of her property with City water, does not deprive her of her property without due process of law.

It is well settled that the enforcement of a contract voluntarily entered into does not deprive a person of property without due process of law.

All contracts are made subject to existing laws, and such laws enter into and become a part of the contract, as if they were there in express terms.

Provident Institution v. *Jersey City*, 113 U. S., 506.

The above case is peculiarly applicable to the case at bar. Therein the holder of two mortgages upon property supplied with water contested the validity of a statute, which made a lien for water charges prior to all encumbrances, upon the ground that the statute deprived it of its property without due process of law. This Court, in upholding the validity of the statute, said (p. 515):

> "When the complainant took its mortgages, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction."

The above ruling applies to the case at bar. The property of the plaintiff-in-error was connected with the City's water system. That connection, whether made by the plaintiff or her predecessor in title, was made subject to the existing statutory provision that such property would be subject to a lien for unpaid water charges thereon, and such connection and its continuance constituted an assent to the terms of such statute.

Silkman v. *Water Commissioners*, 152 N. Y., 327 (*supra*).

The subjection of the property to a lien for unpaid water charges was therefore one of the terms of the contract under which the property was connected with the City's water supply. Hence under the decision in *Provident Institution* v. *Jersey City, supra,* the enforcement of such a lien does not deprive the plaintiff of her property without due process of law.

It should be borne in mind that the contract with the City for the supply of water to the plaintiff's premises dates back to the time when the building was originally connected with the City's water mains, and not to the time when the particular meters were installed. *The original connection of the premises with water and the continuation of such connection constituted an agreement to pay for water at established rates according to the nature of the use of water supplied thereto.* Hence, if at any time the use of the premises justified the installation of a meter, and the imposition of meter rates, such rates and the resulting lien are imposed by virtue of such agreement entered into at the time the property was first connected with the City's mains, and since continued, that if water was used for such purposes it might be charged therefor at the legal rates and a lien enforced against the property for non-payment of the charge.

It is thus immaterial who originally applied for the water connection to the premises, as the plaintiff in taking title thereto must, so long as she *retained* the water connection, be deemed to assent to the terms of the statute under which the connection was made and continued and under which water is supplied to property generally in the City of New York. One of those terms, as before set forth, is the subjection of her property to a lien for unpaid water charges.

With these principles in mind, it is of no moment that the water supplied herein was used by a lessee and not by the plaintiff personally.

City of East Grand Forks v. *Luck*, 97 Minn., 373; 6 L. R. A. (N. S.), 198.

In that case the statute provided (p. 199):

> "The owner of private property, which property has upon it pipes connected with the city waterworks to convey water thereto, shall, as well as the lessee of the premises, be liable to the city for the rents or rates of all water from said waterworks, used upon said premises, which may be recovered in an action against such owner, lessee or occupant, or against any or all of them."

The above statute was by another statute made to apply to electric light furnished by a city. The owner of premises sought to escape a charge for electric lighting supplied to his lessee upon the ground that the statute was unconstitutional in that it made him pay for the debt of another and so deprived him of his property without due process of law. In upholding such charge the Court said (p. 201):

> "Such provision does not, in our judgment, provide that a person shall pay the debts of another, and thus take his property without due process of law. The theory of the charter is that the *obligation on the part of the owner rests upon contract, which is implied by the fact that he connects his premises with the city water or electric-light system, and permits the occupant to use the same.*"

In the case at bar the plaintiff not only permitted the lessee to use the water, but in addition sought to protect her property from any arrears of water charges by inserting in the lease a covenant that the lessee should pay "all charges for Croton water

which are or may be assessed or imposed on said building, according to law, during the term of this lease, and if not so paid, the same shall be added to the rent due or to become due."

At the time plaintiff leased her premises to the tenant there was a meter on the premises. She must have known that water had been supplied through such meter and that any water thereafter supplied would pass through such meter. The fact that a second meter was installed which enabled the tenant to ascertain the amount of water used in a certain portion of the premises as distinguished from the water supplied to the rest of the premises or permitted more water to be supplied, was immaterial. Thereafter two meters measured the water used upon the premises instead of one; and the covenant in the lease before quoted answers the plaintiff's argument that she could not limit the credit which the City may extend.

See *Provident Institution* v. *Jersey City,* supra, wherein this Court answered a similar contention by the plaintiff in that case as follows (113 U. S., 506, 515):

> "The law which authorized these coercive measures gave to mortgagees and judgment creditors the right to pay the rents and to have the benefit of the lien thereof; so that it was in their own power to protect themselves from any such penalties and accumulations of interest."

Likewise in the case at bar the plaintiff could under the terms of the lease have paid the water charges and added the same to the rent.

What we have stated herein to the effect that plaintiff in continuing the connection of her premises with the City's water mains, voluntarily assented to the charging of her property with a lien

thereon for unpaid charges, is in entire accord with the decision of the Court of Appeals of the State of New York in *New York University* v. *American Book Co.*, 197 N. Y., 294, wherein the Court said (p. 297):

> "As the sale by the city is necessarily on credit, as security for the payment of the debt a lien is imposed on the property itself for any unpaid charge. The plaintiff's property being thus *pledged* for the security of the defendants' debt, the plaintiff occupied the position of a surety, * * *."

When the Statute provided for the supply of water by the City, it did not intend that the City should be limited to the personal credit of the person actually using the water, whether the owner or a lessee.

For the protection of the City it was deemed best that the water should be supplied upon credit of the property itself, hence the provision for the lien for unpaid water charges. The voluntary act of the original owner in securing the water connection or of the plaintiff herein in retaining the connection with the City's water mains, under the statutory condition that the property was thereby pledged as security for the payment of all water charges resulting by virtue of such connections, constituted the voluntary pledging of the property for that purpose.

Although the Court used the term "surety" the rest of the language used indicates that that term was meant in the sense of owner of pledged property, and not in the technical sense of a surety.

That the statute does not make an owner of property a surety in a technical sense is apparent. If the plaintiff had used the water herself, it would be absured to say that under the statute she, as

owner, was a *surety* for herself as user of the water. On the other hand it would not be absurd to say that her *property* in that case *was pledged* as security for the payment of the water charges. The lien which the City has on the plaintiff's property makes the City the *pledgee* of such property. As such pledgee it may proceed against the pledged property.

Ketchem v. *Provost*, 156 App. Div., 477, affd., 215 N. Y., 631.

The objections to the statute raised by the plaintiff, based on strict rules of suretyship, are therefore immaterial, as no such liability is claimed against the plaintiff. If the plaintiff were a surety in the sense assumed by the plaintiff, the City could proceed only against her personally for the water charges. Under the statute, however, the City may enforce the charge as a lien against the property *in rem* and hence plaintiff is not a mere surety but, as before stated, the owner of pledged property.

To summarize we have the connection of the property with the City's water mains on the accepted statutory condition that the property stand as a pledge for unpaid water charges. The water charges have not been paid and the City by its lien may apply the pledged property towards the payment of the debt. The whole transaction is contractual from beginning to end and the enforcement of the City's contractual rights against the pledged property does not deprive the plaintiff-in-error of her property without due process of law.

IV.

The conclusions and contentions of the plaintiff-in-error concerning the facts and issues herein are erroneous.

(a) *The plaintiff failed to show that she did not expressly request a supply of water to the premises by meter measurement.*

In support of her contention that there was no contractual relation between the plaintiff and the defendant for a supply of water to the premises by meter, the plaintiff-in-error states in her brief (page 13):

> "There is nothing in the record to show that the plaintiff ever applied for the purchase of water on a consumption basis. The contrary affirmatively appears at least as to the second meter which was installed solely at the tenant's request. * * * *There was in fact no express contract between these parties.*"

The record shows, however, that there is no basis for this statement and conclusion, for in this action to cancel the lien the burden rested upon the plaintiff to prove a state of facts to warrant the Court in granting such relief, and the evidence fails to support the plaintiff's claims.

Thus it was incumbent upon the plaintiff to show title to the property, and she alleged (Record, page 3), that she "is and at all times hereinafter was the owner." Upon the trial no proof of title was given, but as it was conceded (Record, page 16), "that the plaintiff is the owner * * * and was such owner during the year 1907 to the present time," the Court accordingly found (Record, page 11) that the plaintiff "is and at all times hereinafter mentioned was the owner" of the property.

The Court further found (Record, page 12) in view of the concessions made upon the trial, the following:

> "VII. The first meter was installed in the year 1900 to replace a meter removed, and there is no evidence to show whether this meter was installed at the request of the owner or at the request of the tenant or at the direction of the duly constituted authorities of the City of New York. The permit therefor was issued to one John Ford and no evidence was given as to his relation to the property or as to the installation of the meter removed."

The plaintiff failed to present any evidence save that when the charges were imposed she was the owner of the property, and did not show that the first meter, installed in 1900, was not installed upon her express request and assent. From all that appears, she was then the owner and caused or acquiesced to the installation of the meter. And if any reliance was to be placed by the plaintiff upon the claim that assent was not given, or that any protection was afforded by the charges imposed in earlier years under the provisions of laws in effect prior to the installation of the meter, or that she was warranted in assuming that frontage and not meter charges were to be imposed, sufficient proof thereof should have been given.

In the absence of such proof the plaintiff failed to show that she did not as owner originally expressly request and assent to a supply of water to the premises by meter, and from all that appears an express contract for such supply was made. And even though no request was made by the plaintiff for the installation of the second and additional meter, it is to be noted that the purpose of such meter was not to obtain water for other or additional property, but to the same premises, already supplied with water by the original meter and that

such second meter served merely to permit an adequate supply to the premises.

(b) *There was no evidence herein of any change by the City in supplying water to the premises from "an assessment" to a "consumption basis" without the plaintiff's consent.*

It would seem to be implied by the plaintiff herein that she has been aggrieved by action of the City in changing the supply of water to her premises from "an assessment" to a "consumption basis," which change she was powerless to resist. The record, however, is barren of evidence of any such change, and on the contrary, all the evidence is to the effect that water has been furnished by meter to the premises which have been adapted to and have been used for business purposes, the original supply being by a single meter and thereafter by two meters. In arguing, therefore, that the installation of meters rests solely in the discretion of the City officials, that such installation results in extending to tenants any amount of credit and (p. 22) that "the City has by choice elected to do business with the tenant by changing from an assessment basis and installing the meter," the plaintiff is proceeding upon a basis of facts not herein presented.

(c) *The plaintiff's statement and contention that the Charter imposes no liability on the owner of property for water supplied thereto is erroneous.*

The plaintiff's conclusion that the Charter provisions impose no liability on owners of property for a supply of water thereto, evidently rests upon the view that the word "consumer" contained therein must, where premises are rented, be limited to tenants and upon a misapprehension of the effect of the express provision of the statute that the charges for water shall be a lien upon the premises.

While in one sense the tenant is the "consumer," being the person actually using the water supplied, in the broader sense in which the word is used in the statute, the "consumer" is the owner of the premises for whose ultimate benefit and to whom the water is supplied upon the voluntary act of the owner in connecting the premises with the City's water supply.

Apart, however, from this subject, the statute expressly provides that the charges for water shall be a lien upon the property itself, thus explicitly imposing liability upon the owner for payment of the charges. Accordingly, as said by the State Court herein (Record, page 25):

> "under the statute both the tenant and the owner are liable."

Thus the distinction sought by the plaintiff to be drawn between this case and *Provident Institution* v. *Jersey City*, 113 U. S., 506, is without merit.

(d) *The supply of water by a municipality is the exercise of a governmental function, and accordingly a lien on the property so supplied for charges therefor by meter measurement may properly be imposed.*

The plaintiff further erroneously contends that the statute herein does not relate to the exercise of governmental power by the municipality where water is furnished by meter, and hence no lien may be imposed, and that the act is as unconstitutional as would be an act making owners of land liable for coal or groceries delivered to a tenant.

This argument is in direct conflict with the decisions of the Courts concerning the powers and duties of municipalities and fails to recognize that no different function is performed by a City where the charge made for the supply of water is measured

by meter than where the charge is upon a frontage or other reasonable basis. Charges by meter measurement have been generally recognized as founded upon a reasonable basis and in supplying water to the owners of premises a distinct governmental function is exercised by municipalities.

Thus in the case referred to of *Provident Institution* v. *Jersey City*, 113 U. S., 506, this Court said (page 516):

> "We are not prepared to say that a legislative act giving preference to such liens even over debts already created by mortgage, judgment or attachment would be repugnant to the Constitution of the United States. Nor are we prepared to say that an act giving preference to municipal water rents over such liens would be obnoxious to the charge. *The providing a sufficient water supply for the inhabitants of a great and growing city is one of the highest functions of municipal government* and tends greatly to enhance the value of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited."

V.

The lien herein, properly imposed, resulted from the plaintiff's own neglect in not requiring her tenants to pay the water charges promptly, in accordance with the terms of their lease.

Herein it appears that the plaintiff in 1907, as shown by the lease (Record, page 6), acquiesced in the use by the tenants of water supplied by the City to the premises for business purposes, which water under the statute in effect could be meas-

ured by meter and in fact was measured by meter, the charges for such supply to be a lien on the premises.

When the lease was made by the plaintiff to her tenants on October 1, 1907, the meter was in the building, and by the lease the tenants agreed to pay "all charges" for water imposed during the lease. Although it is claimed that the second meter for the supply of water to the premises was installed in 1907 without the knowledge of the plaintiff, such fact was available to the plaintiff from the City's records as were all the charges made from time to time against the premises for the supply of water, and apparently all the meter charges were paid either by the owner or by tenants until March 4, 1913.

During all this time the plaintiff had knowledge of the use by the tenants of the water supplied by the City to the premises for business purposes, and is deemed to have been fully cognizant of the law which was in effect since the first meter was installed in 1900, that such charges would become a lien on the property. She accordingly attempted to protect herself and her property from such lien by stipulating in the lease, made in 1907, that the tenants should pay such charges. Instead, however, of enforcing the terms of the lease and requiring that the tenants pay promptly the charges as they were imposed and shown by the City's records, she failed to do this, and so far as appears took no action to require them to pay the charges until finally in the bankruptcy proceedings referred to, she sought to require such payment by them, as a claim having priority. Whether she may, as other creditors, ultimately obtain from them payment of any part of the amount due from them by the obligations contained in the lease, does not appear, but in any event, it was her neglect alone which would result in any loss.

VI.

The necessity and expediency of the statutory provisions are properly for the determination of the State Legislature.

The object of sections 473 and 475 of the Charter is to enable The City of New York to proceed at once to supply water wherever needed to property owners who have connected their premises with the City's supply, in assurance that its charges for the same will be paid. The State Legislature has accordingly provided in the statute that the amount of such charges shall be a lien on the premises. And the statute contains no requirement that owners shall sign application for installation of meters. By the statute, meters may be installed in premises so connected by owners, where the premises are used for business purposes. By section 473 the charges where meters are placed are to be determined only by the meter measurement and by section 475 of the Charter the Legislature has authorized the Commissioner of Water Supply, Gas and Electricity, where premises have been so connected "in his discretion to cause water meters * * * to be placed * * * in all places in which water is furnished for business consumption."

The Court, therefore, should not attempt to direct the Commissioner in the exercise of the discretion vested in him by the Legislature, and especially in a case such as this, where the plaintiff has failed to show that her premises should not be metered under the statute, but on the contrary, admits that they are used for business purposes as shown in the clause of the lease (p. 6), which provides that the tenant shall not "use or suffer to be used the whole or any part thereof for any purpose more injurious thereto than the *general commission business.*"

At page 25 of her brief the plaintiff-in-error argues, however, that it is unjust for the City to impose a lien on the premises for unpaid water charges and offers the suggestion (p. 26) that:

> "The City can fully protect itself by requiring the application for water service to be signed by the owner, and the owner can, in that way, limit the period or the amount for which he consents to be bound, and upon the expiration thereof, the City can shut off the water, requiring in such application an agreement by the owner to meet such extra charges as may be incurred in turning on or off the water."

This, however, is not directed by the Legislature and the question of the necessity and expediency of the provisions of the statute is not one requiring determination or intervention by the Court.

In *McCabe* v. *City of New York*, 213 N. Y. 468, 481, it was held that there was a presumption that the acts of administrative bodies operating under legislative authority were performed in the exercise of careful judgment and that it was not within the power of the judicial branch of the government to annul such acts.

In *Monongahela Navigation Co.* v. *U. S.*, 148 U. S., 312, 327, this Court has ruled:

> "The Legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character."

And, in *Adirondack Ry. Co.* v. *New York*, 176 U. S., 335, 349, the Chief Justice declared that

> "The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government."

The plaintiff-in-error further states, at page 26 of her brief, that the Charter provision "is constitutional if construed to apply only to water furnished to the owner or to his tenant in accord with the owner's written consent and agreement."

Herein the very ground upon which the Trial Court decided the case in favor of the City was that if not express, there was an implied contract appearing from the facts presented, citing (p. 15):

> "Provident Institution *v.* Jersey City, 113 U. S., 506;
> "Hill *v.* Thompson, 50 N. Y. Sup. Ct. Rep., 165, and
> "City of East Grand Forks *v.* Luck, 97 Minn., 373."

The Appellate Division of the Supreme Court unanimously affirmed the judgment on this ground, the opinion of Mr. Justice Shearn stating (p. 25):

> "When an owner expressly consents to the tenant's using water in the building, supplied through pipe *installed by the owner, or continued by the owner*, for the purpose of connecting the building with the City's water main, the owner assents to the City's supplying water to the tenant for use in the building."

And the Court of Appeals unanimously affirmed the judgment "on opinion of Shearn, *J.*, at Appellate Division" (p. 27).

In view of the facts herein and the decisions referred to and in the absence of proof that the provisions of the Charter which make unpaid water charges a lien on premises are unnecessary and inexpedient, the defendant-in-error submits that this Court is not required to interpose herein, that the question of changing the authority of the Commissioner of Water Supply or limiting the discretionary powers vested in him, is not one for the

determination of the Court but for the State Legislature, and that the plaintiff herein gave her consent to the supply of water to the premises by meter measurement.

VII.

The writ of error should be dismissed and the determination of the State courts affirmed.

New York, January, 1920.

Respectfully submitted,

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The City of New York,
Attorney for Defendant-in-Error.

WILLIAM HERBERT KING,
CHARLES E. LALANNE,
of Counsel.

DUNBAR *v.* CITY OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 160. Argued January 21, 1920.—Decided March 1, 1920.

The owner of a building in New York City demised it to tenants who in breach of their covenant failed to pay the city's water-charge based on the measured amount of water they consumed. *Held*, that the imposing of a lien for the charge thus incurred by the tenants, under charter provisions operative when the lease was made, did not deprive the owner of property without due process of law. P. 517.

Constitutional rights cannot be based on error in prior court decisions. P. 518.

177 App. Div. 647, affirmed.

THE case is stated in the opinion.

Mr. Harold G. Aron, with whom *Mr. Henry M. Wise* was on the brief, for plaintiff in error.

Mr. William Herbert King, with whom *Mr. William P. Burr* and *Mr. Charles E. Lalanne* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error, to whom we shall refer as plaintiff, is the owner of certain real property and a building thereon

in the City of New York which she leased to William Hills and William Hills, Jr., copartners doing business under the style of William Hills, Jr. The lessee covenanted to pay the charges for water which should be assessed against or imposed upon the building during the lease, and if not so paid it should be added to the rent then due or to become due.

The copartnership was subsequently adjudged bankrupt and at the time of the petition was indebted to the city in the sum of $379.89 for water supplied as measured by two meters which had been installed in the property.

The city proved no claim in bankruptcy and a motion by plaintiff for an order directing the trustee to pay the water charges as a tax entitled to preference under the Bankruptcy Act was denied on the ground that they were not a tax.

The plaintiff then brought this action to cancel the charge as a lien upon the property and prayed an injunction against its enforcement.

The contention against the charge of the city and the lien it asserts is that they are in violation of § 1 of the Fourteenth Amendment of the Constitution of the United States and because they deprive plaintiff of property without due process of law.

Plaintiff's argument is somewhat difficult to state briefly. It commences by declaring that the question presented was left open in *Provident Institution* v. *Jersey City*, 113 U. S. 506, which sustained the postponement of mortgages to the lien of water rents because it was said in that case that the complainant in the case knew what the law was when the mortgages were taken, and therefore "its own voluntary act, its own consent," was "an element in the transaction."

Counsel assumes that the case presented an instance of an express consent. In that counsel is mistaken. The consent was implied from the fact that the law imposing

the water rents preceded the mortgages. And so in the water charge in controversy, it was imposed and made a lien on plaintiff's property by the charter of the city and therefore the Supreme Court at the first instance and afterwards in Appellate Division, and we may assume the Court of Appeals, decided that the consent of plaintiff could be implied, and any other conclusion would have been impossible. A city without water would be a desolate place and if plaintiff's property was in such situation it would partake of the desolation. And as a supply of water is necessary it is only an ordinary and legal exertion of government to provide means for its compulsory compensation.

It is of no consequence, therefore, at whose request the meters were installed in the property. The meters as observed by the Appellate Division were "not the instrumentalities for furnishing the water," they only registered its consumption. And besides, the lease made by plaintiff contemplated the use of water by the lessees and provided, as far as the lessor (plaintiff) could, for the payment of the charges for it. That her tenants defaulted in their obligation by reason of their bankruptcy was her misfortune but it did not relieve the property, which, we may say, would be unfit for human habitancy if it could not get water.

Counsel appear to rely on prior decisions of the court for relief of plaintiff, one in the Supreme Court, in which, it is said, a doubt was intimated whether a statute making a lessor liable for the personal debt of a lessee for water would be constitutional; and one in the Court of Appeals which, to quote counsel, "having decided in 1910, three years prior to the inception of the charges for which the lien is claimed, that the statute meant what the earlier case had suggested, the lien became unconstitutional" and plaintiff cannot be charged with an "implication of assent" to it. Without attempting an estimate of the

516. Argument for Petitioner.

contention it is enough to say that the decision in this case and other cases are opposed to the contention, and that besides no constitutional rights can be based on the error of prior decisions.

Judgment affirmed.